

# THEFT BY FALSE PROMISES

Arthur R. Pearce †

## I. INTRODUCTION

Theft is misappropriation of property. All thieves use a technique to neutralize the owner's privilege to prevent an unwanted appropriation. If an owner is aware of an appropriation and conscious that he does not want it, violence or intimidation is usually necessary to effect appropriation, and the aggravated form of theft known as robbery or extortion results. "Gentle theft"—larceny, false pretenses and embezzlement—depends upon stealth and deceit. By stealth, an appropriation itself may be concealed from the owner; by deceit, its objectionable aspect is concealed.

Theft by deceit is the offense of obtaining property by false pretenses.<sup>1</sup> It is the only conventional Anglo-American crime which punishes misappropriation by deceit.<sup>2</sup> Yet there are forms of deceit which, though consciously and successfully practiced for the purpose of effecting a misappropriation, are excluded from its scope. False promises, *i.e.*, promises made without intention of performance, constitute the form of deceit which appellate courts have been called upon most frequently in recent years to declare insufficient to support a conviction of false pretenses.<sup>3</sup> Indeed the false promise is probably the *only* form

† A.B., 1939, Columbia University; LL.B., 1949, University of Minnesota; University Fellow, 1949-50, Columbia University; Assistant Professor of Law, University of Pennsylvania Law School.

1. The same offense is occasionally called "cheating by fraudulent pretenses," PA. STAT. ANN. tit. 18, §4836 (Purdon 1945), or simply "cheats," State v. McMahon, 49 R.I. 107, 140 Atl. 359 (1928). This nomenclature reflects the origin of the offense in the common law misdemeanor of cheats, *infra*, note 10 and text. In Texas the same offense is called "swindling," whereas "theft by false pretext" refers to larceny by trick, see King v. State, 152 Tex. Cr. 255, 258, 213 S.W.2d 541, 543 (1948).

2. Forgery, although it punishes deceit, does not require an appropriation. Larceny by trick does not punish deceit, see text at note 92 *et seq.*, *infra*.

3. Examination of all cases decided in the period 1943-1953 which are digested in the American Reporter System, 20 FIFTH DECENNIAL DIGEST (1948), and 18 GENERAL DIGEST, 2D SERIES (1953), under the heading "False Pretenses, Elements of Offenses, Nature of Pretense," reveals the following: The issue of whether or not a particular form of deception constituted a false pretense has been raised in 32 appeals. In 27, the form of the deception was contended by the criminal defendant to be a promise and thus not a false pretense. See note 4 *infra*. In the other five, the appellants each contended, unsuccessfully, that the only misrepresentation was by implication and therefore not a false pretense, Johnson v. People, 110 Colo. 283, 133 P.2d 789 (1943) (reversed on other grounds); Hadden v. State, 73 Ga. App. 23, 35 S.E.2d 518 (1945); Lee v. Commonwealth, 242 S.W.2d 984 (Ky. 1951); State v. Hastings, 77 N.D. 146, 41 N.W.2d 305 (1950); Dixon v. State, 152 Tex. Cr. 504, 215 S.W.2d 181 (1948). It is possible that in one case the appellant

of deceit which has been *held* insufficient by an American appellate court in the past decade. Courts in eight jurisdictions have so held during this period,<sup>4</sup> each grounding its decision on the established dogma that a false pretense must be a misrepresentation of an existing fact. An appraisal of this dogma as it applies to false promises is the purpose of this article.

## II. ORIGIN OF "EXISTING FACT" DOGMA

The earliest scholarly articulation of the dogma<sup>5</sup> is found in the first edition of Wharton's *American Criminal Law*, which appeared in 1846:

"In the first place, it will be noticed that the false pretences, to be within the statute,<sup>6</sup> must relate to a state of things averred to be at the time existing, and not to a state of things thereafter to exist."

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sought to invoke the rule that a misrepresentation of an opinion is not a false pretense, since the appellate court recites the doctrine on this issue in its opinion; however, the recitation is followed by the assertion that "The principle stated . . . is not applicable under the indictment in this case nor the proof." *Whatley v. State*, 249 Ala. 355, 357, 31 So.2d 664, 666 (1947).

4. *Chaplin v. United States*, 157 F.2d 697 (D.C. Cir. 1946); *James v. State*, 218 Ark. 335, 236 S.W.2d 429 (1951); *State v. Robington*, 137 Conn. 140, 75 A.2d 394 (1950); *State v. Pierson*, 91 A.2d 541 (Del. Super. Ct. 1952); *Button v. State*, 226 Ind. 312, 79 N.E.2d 903 (1948); *State v. Lamoreaux*, 13 N.J. Super. 99, 80 A.2d 213 (1951); *People v. Karp*, 298 N.Y. 213, 81 N.E.2d 817 (1948).

During the same period, appellate courts have ruled against 19 criminal defendants who have contended that the deceptive behavior with which they were charged did not amount to false pretenses because only promises were involved. Six defendants failed as a result of the rejection of the rule of law contended for, *People v. Davis*, 112 Cal. App.2d 286, 246 P.2d 160 (1952); *People v. Mason*, 86 Cal. App.2d 445, 195 P.2d 60 (1948); *People v. Gordon*, 71 Cal. App.2d 606, 163 P.2d 110 (1945); *People v. Ames*, 61 Cal. App.2d 522, 143 P.2d 92 (1943); *Commonwealth v. Green*, 326 Mass. 344, 94 N.E.2d 260 (1950); *State v. Singleton*, 85 Ohio App. 245, 87 N.E.2d 358 (1949). The other 13 failed because the appellate court held that the representations involved amounted to, or included, representations of fact, *People v. Chamberlain*, 96 Cal. App.2d 178, 214 P.2d 600 (1950); *Finlay v. State*, 152 Fla. 396, 12 So.2d 112 (1943); *Suggs v. State*, 69 Ga. App. 383, 25 S.E.2d 532 (1943); *Pierce v. State*, 226 Ind. 312, 79 N.E.2d 903 (1948); *State v. Mandell*, 353 Mo. 502, 183 S.W.2d 59 (1944); *State v. Neal*, 350 Mo. 1002, 169 S.W.2d 686 (1943); *Hameyer v. State*, 148 Neb. 798, 29 N.W.2d 458 (1947); *State v. Pasquale*, 5 N.J. Super. 91, 68 A.2d 488 (1949); *Bopst v. State*, 248 P.2d 658 (Okla. Cr. 1952); *Commonwealth v. Gross*, 161 Pa. Super. 613, 56 A.2d 303 (1948); *Carter v. State*, 150 Tex. Cr. 448, 203 S.W.2d 540 (1947); *Ballaine v. District Court*, 107 Utah 247, 153 P.2d 265 (1944); *Frank v. State*, 244 Wis. 658, 12 N.W.2d 923 (1944).

5. A tenable claim to priority of articulation could be made for 1 CHITTY, *PRACTICE OF THE LAW* 135 (1st Am. ed. 1834). However his formulation is somewhat narrower, in that it is limited to representations as to the defendant's future behavior, rather than extending to all statements about the future. In any event, the anchor for Chitty's rule, like Wharton's, is *Rex v. Goodhall*, Russ. & Ry. 461, 168 Eng. Rep. 898 (1821), and Wharton makes a better point of departure because of his greater influence on the development of the American law.

6. The reference here is to 30 GEO. II, c. 24 (1757), the English statute which created the crime of false pretenses, in its modern form, and which has been substantially reenacted in all American jurisdictions.

An illustration follows for which no case is cited, and the paragraph concludes:

"A pretence that the party would do an act that he did not mean to do (as a pretence that he would pay for goods on delivery) was holden by all the judges not to be a false pretence, within the statute of George 2 [citing *Rex v. Goodhall*]; and the same rule is distinctly recognized in Massachusetts [citing *Commonwealth v. Drew*]." <sup>7</sup>

The originality of Wharton's proposition is emphasized by comparison with the positions of Archbold, Russell, and Roscoe—three leading English criminal law scholars of the period.

Russell reports the case of *Rex v. Goodhall* in language which suggests that he saved Wharton the effort of composing his own descriptive sentence,<sup>8</sup> but he undertakes no doctrinal generalization from the decision. Archbold and Roscoe also report *Rex v. Goodhall*, but both of them flatly negate the generalization which Wharton bases on that decision, asserting that "it is no objection that the false pretences merely relate to a future event."<sup>9</sup> Since Wharton's dogma is now found in every authority on criminal law and is supported by thousands of cases, the two decisions on which he bases its original assertion deserve examination.

An appreciation of *Rex v. Goodhall* requires some exploration of the development of the crime of false pretenses in the three quarters of a century which preceded its decision. The common law offense of cheating, as somewhat amplified by a statute of 1541, appears to have been restricted to frauds effected by some material device or token "against which common prudence and caution could not guard."<sup>10</sup> In 1757, a statute was enacted which provided punishment for "all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person . . . money, goods, wares, or merchan-

7. WHARTON, *AMERICAN CRIMINAL LAW* 543 (1st ed. 1846).

8. "A pretence that the party would do an act which he did not mean to do (as a pretence that he would pay for goods on delivery) was holden not to be a false pretence within this statute." 2 *TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS* 300 (2d ed. 1828).

9. The quotation is from ROSCOE, *DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES* 418 (2d Am. ed. 1840); the exact language of Archbold is: "It is no objection, however, that the false representation is of a transaction to take place at a future time," *PLEADING AND EVIDENCE IN CRIMINAL CASES* 183 (3d ed. 1828). Both rely on *Rex v. Young*, *infra* note 19 and text, for this limitation of the *Goodhall* decision.

10. 1 HAWKINS, *PLEAS OF THE CROWN* 343-44 (6th ed. 1777). East places greater emphasis upon the requirement that the fraud affect the public generally, and considers the use of false tokens as but one example of fraud "against which it is said that ordinary care or prudence is not sufficient to guard." 2 *EAST, PLEAS OF THE CROWN* 817 (1806).

dizes, with intent to cheat or defraud any person . . . .”<sup>11</sup> The new statute had little initial impact. Four years after its enactment one Wheatly was indicted for obtaining money from another by representing to him that the quantity of beer which he was delivering to the latter was 18 gallons, although Wheatly knew that it was only 16 gallons. The indictment asserted that Wheatly’s behavior was “to the evil example of others in the like case offending, and against the peace of our Sovereign Lord the King his Crown and dignity,” but there was no intimation that it violated the new statute. The King’s Bench arrested judgment on a verdict of guilty, pointing out that there was no evidence of false weights or measures, “nor any false token at all.”<sup>12</sup> The only hint of awareness of the new statute is contained in the plaintive assertion of Norton, arguing for the Crown, that “here is a *false pretence*, at the least: and it appeared at the trial to be a very foul case.”<sup>13</sup>

Further evidence of the delayed impact of the statute is afforded by the confusion it created in the decision of *Pear’s Case* 18 years later.<sup>14</sup> Pear had hired a horse, ostensibly to use it for a single day’s journey and promising to return it at the end of the day. He immediately sold the horse; and on an indictment for the felony of larceny, the jury found specially that at the time he hired the horse, he had not intended to return it. The judge on assize having respited judgment and reserved his decision for the determination of the judges, it was decided that a conviction for larceny was proper. However, only seven of the eleven<sup>15</sup> judges who delivered opinions concurred in this decision. According to East, three of the other four agreed that Pear’s behavior would have been larceny prior to the enactment of the false pretense statute, but they felt that new statute required a different result.<sup>16</sup> Larceny was a felony. The false pretense statute and its predecessor defined a misdemeanor. These judges argued that the statutes established a legislative treatment discrimination between taking by fraud and taking by stealth, and that it was therefore improper to treat Pear’s offense as a felony since the mare had been obtained by fraud. The

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11. 30 GEO. II, c. 24 (1757).

12. *Rex v. Wheatly*, 2 Burr. 1124, 97 Eng. Rep. 746 (1761). The quotation is from the opinion of Dennison, J., but the opinions of Mansfield and Wilmot, JJ., contain substantially the same language.

13. *Id.* at 1126, 97 Eng. Rep. at 747 (Italics added).

14. 1 Leach 253 (3d ed. 1800), 168 Eng. Rep. 208 (1779). The case is also fully reported in 2 EAST, PLEAS OF THE CROWN 685 (1806).

15. East reports that the missing judge was Blackstone, who was ill. He also asserts that Blackstone agreed with the majority, 2 EAST, *op. cit. supra* note 14, at 686.

16. *Id.* at 686-87.

analytically sound answer to this contention, as will be explained presently,<sup>17</sup> would seem to be that Pear's offense was essentially stealthy rather than fraudulent. One judge so answered it.<sup>18</sup> But seven of the judges rendered the statute totally irrelevant to the case at hand by reading into it an express requirement of one portion of the 1541 statute relating to cheating. That statute had extended criminality to the obtaining of property by "false tokens or counterfeit letters" *in other men's names*. The seven reasoned that the new statute reached only the obtaining of property *in the name of a third person* by false pretenses!

The sharp departure of the language of the new statute from that of its predecessor was not given full effect until the celebrated decision of *Rex v. Young* in 1789.<sup>19</sup> Young and his confederates had represented to one Thomas that they had made a bet on a race which was to be run shortly and that it was a "sure thing." By this means they induced Thomas to give them some money to cover his share of the bet. They were indicted under the false pretense statute, and a jury found that both the race and the bet were fictions designed to defraud Thomas of his money. The case was taken to King's Bench on writ of error. Young's counsel ably contended that the legislative intent was not nearly so broad as the language of the statute, that in particular there had been no intention to dispense with the common law limitation of the offense to frauds against which common caution may not guard.

"Where the representation is of a thing *past* or *present*, against which caution cannot guard, it may come within the statute but if it be a representation of some *future* transaction, concerning which enquiries may be made, it is not an indictable offence under this statute, but is only the subject of a civil remedy; because the party can only be imposed upon through his own negligence."<sup>20</sup>

The argument was ingenious. It was an effort not only to retain the common law limitation to frauds "against which common caution may not guard," but also to exclude representations as to future transactions from this restricted class. Since mere verbal representations of any sort were insufficient to constitute common law cheats, it seems obvious that it had been previously unnecessary to differentiate between those as to future and those as to past events. It is reasonable to infer that the argument was pointed at Grose, J. Previously in the same

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17. See text at note 93 *et seq. infra*.

18. See the opinion of Eyre, B., in *EAST, op. cit. supra* note 14, at 689 n.(a).

19. 3 Durn. & E. 98 (1789).

20. *Id.* at 100.

term, he had dissented from the decision of *Pasley v. Freeman*,<sup>21</sup> the foundation case of the modern tort of deceit, and a brief quotation from his dissenting opinion will demonstrate his particular sensitivity to the appeal of Young's counsel:

"There are cases of two sorts in which, though a man is deceived, he can maintain no action. . . . The second head of cases is where the affirmation is (what is called in some of the books) a nude assertion; such as the party deceived may exercise his own judgment upon; as where it is matter of opinion, where he may make enquiries into the truth of the assertion, and it becomes his own fault from laches that he is deceived."<sup>22</sup>

The argument was unanimously rejected, however, and the conviction affirmed. Even Grose, J., wrote: "The statute created a new offense. . . . And I am clearly of the opinion that this case comes within the act of parliament."<sup>23</sup>

The *Young* decision is hailed by Hall, in his excellent analysis of the "very strong movement to extend the law of theft which is unmistakable from 1779 on,"<sup>24</sup> as a great advance from the decision of *Rex v. Wheatly* 30 years earlier. And indeed it was. The King's men had marched up the hill. Unfortunately for its complete accuracy of impression, however, Hall's analysis stops short of the decision 30 years later in *Rex v. Goodhall*,<sup>25</sup> in which the King's men marched down again. It was not the same men; it appears that they did not even know it was the same hill; but the retreat has had as great an effect on the law of theft as had the triumphant ascent.

There appears to be but one, rather scanty, report of *Rex v. Goodhall*. As the facts appear in the report, Goodhall wanted to buy some meat. The vendor was unwilling to extend him credit, so Goodhall arranged that the meat would be sent him and that he would return payment with the delivery boy. Upon the arrival of the meat the following day, Goodhall induced the delivery boy to leave the meat and carry back to his master a message that Goodhall had a hand note which he would be glad to send to the vendor if he would send back proper change with the messenger. In the alternative, he promised to meet the vendor and pay him not later than the following Wednesday. He never paid, and at Goodhall's trial for violation of the false pretense statute, the jury found that Goodhall had never intended to pay.

21. 3 Durn. & E. 51 (1789).

22. *Id.* at 54-55.

23. 3 Durn. & E. 98, 106 (1789).

24. HALL, THEFT, LAW AND SOCIETY 49-52 (2d ed. 1952).

25. Russ. & Ry. 461, 168 Eng. Rep. 898 (1821).

Since apparently the only evidence introduced as to Goodhall's intention not to pay was the fact that he subsequently failed to pay, the judge might quite properly have dismissed the prosecution.<sup>26</sup> Instead, he respited judgment and reserved the case for determination by all of the judges. As was not infrequently the case in the informal determination of "Crown Cases Reserved" at this time, there appears to have been no argument by counsel before the judges.<sup>27</sup> None of the judges who had decided *Rex v. Young* remained on the bench. Among those who had replaced them, as well as among the judges of Common Pleas and Exchequer, there appears to have been none with much judicial experience with the crime of false pretenses, at least on the level of judicial review.<sup>28</sup> Thus apparently without pressure or enlightenment, either from without or from within, the judges reached the conclusion that the conviction was wrong, not because of the insufficiency of the evidence, but because "it was merely a promise for future conduct, and common prudence and caution would have prevented any injury arising from it."<sup>29</sup>

It seems extremely unlikely that the judges were aware that they were turning the clock back a half century on the law of false pretenses. The case is distinguishable on its facts from *Rex v. Young*, since part of Young's misrepresentation, *i.e.*, that a bet had been made, clearly related to the past. However, a comparison of the reasoning

26. In a tort action for deceit, where a false promise is a sufficient fraud, it is considered that subsequent breach of the promise is insufficient evidence of its falsity to take the issue to the jury. See RESTATEMENT, TORTS § 530, comment c (1938). A fortiori, it is insufficient for proof beyond a reasonable doubt.

27. The report gives no indication that the case was argued. Archbold describes the determination of "Crown Cases Reserved" in the period prior to the Crown Cases Reserved Act, 11 & 12 VICT., c. 78 (1848) as follows: "The practice has long existed, where any objection was taken on the part of a defendant, on a trial before any court of oyer and terminer and gaol delivery . . . which the judge considered worthy of more mature consideration, to take the opinion of the jury upon the facts proved and to reserve the objection for the consideration of all the judges, upon a case stated by the judge who presided at the trial: and if the judges, or a majority of them, were of opinion that the objection was well founded, the defendant was recommended to the crown for a pardon. . . . Upon a case so reserved, the judges, although they heard counsel for the defendant, *whenever he thought fit to employ counsel to argue the objection before them*, and in that case heard counsel for the prosecution also, did not sit strictly as a court, but rather as assessors to the judge who tried the case, and the judgment ultimately pronounced was considered in law as his judgment; the reasons on which it was founded not being publicly declared by the judges." ARCHBOLD, CRIMINAL PLEADING 160 (14th ed. 1859) (Italics added.)

28. Bayley, J., had participated in the decision of *Rex v. Perott*, 2 Mau. & Sel. 379, 105 Eng. Rep. 422 (1814), in King's Bench on writ of error, and was among the judges who considered *Rex v. Hill*, Russ. & Ry. 190, 168 Eng. Rep. 754 (1811). Graham, B., had participated in *Rex v. Story*, Russ. & Ry. 81, 168 Eng. Rep. 695 (1805); *Rex v. Freeth* Russ. & Ry. 127, 168 Eng. Rep. 718 (1807); and *Rex v. Hill*, *supra*. Wood, B., had taken part in the decision of the last two cases. None of these decisions had suggested any limitations on the type of misrepresentation to which the crime of false pretenses was applicable.

29. Russ. & Ry. 461, 463, 168 Eng. Rep. 898, 899 (1821).

of the *Goodhall* decision with the opinions of the *Young* case, read against the theory on which the latter case was argued, makes it quite clear that the two decisions are hopelessly irreconcilable. It will be recalled that the *Young* case was a decision of the King's Bench, and the judges in the determination of Crown Cases Reserved had no power to overrule decisions of the King's Bench. Although Crown Cases were decided by all of the judges, including the judges of King's Bench, their function was merely to assist the judge who had reserved his decision, and the ultimate decision was legally his.<sup>30</sup> It is much more plausible that the judges' reversion to the standard of common law cheats was inadvertent than that they deliberately ignored, or distinguished *sub silentio*, the decision in *Rex v. Young*.

It is thus apparent that the English scholars, in simply reporting *Goodhall* as a decision on its facts, and generalizing the decision in *Young's* case, reflected the law of England more accurately than did Wharton in 1846. How then of the American decision of *Commonwealth v. Drew*<sup>31</sup> which constituted the other half of Wharton's authority for his dogma?

Drew opened an account at a bank and made himself known to the teller by frequent deposits and withdrawals. He finally overdrew his account by presenting to the teller two checks which totalled substantially in excess of his balance, but which the teller paid without bothering to investigate because of Drew's prior dealing with the bank. After conviction of obtaining property by false pretenses, Drew moved for a new trial, and the conviction was set aside by the Supreme Judicial Court of Massachusetts. The court *held* that the presentation of a check by its maker does not imply a representation that the maker has sufficient funds to cover it. In passing, the court undertook, unnecessarily it would seem, a discussion of the meaning of "false pretence" under the statute. Its analysis of *Rex v. Goodhall* differs sharply from that of Wharton. This case is cited in *Drew* for the proposition that "the statute may not regard naked lies, as false pretences. It requires some artifice, some deceptive contrivance, which will be likely to mislead a person or throw him off his guard."<sup>32</sup> Of the varying interpretations which the ambiguous report of *Goodhall* will support, this one at least was legally impossible. Young had been convicted of false pretenses on the basis of a "naked lie," and his conviction was affirmed by the Court of King's Bench. As has been pointed out, this decision could not have been overruled by the decision of a judge on assize,

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30. See note 27 *supra*.

31. 19 Pick. 179 (Mass. 1837).

32. *Id.* at 185.



which is what the opinion of the judges in *Goodhall* was in legal effect. The *Drew* opinion then proceeds to build a dictum on its dictum. Having asserted that no "naked lie" can be a false pretense, it draws a distinction between lies as to the future and lies as to the past. "The pretence must relate to past events. Any representation or assurance in relation to a future transaction, may be a promise or covenant or warranty, but cannot amount to a statutory false pretence."<sup>33</sup> Aside from an early decision of the Mayor of New York,<sup>34</sup> the only authority cited for the dogma is the English case of *Rex v. Codrington*<sup>35</sup> and Roscoe's treatise. As has been pointed out,<sup>36</sup> Roscoe's treatise expressly rejected the proposition in support of which it is here cited. The *Codrington* case, which incidentally was subsequently overruled,<sup>37</sup> held that a false warranty of title by the vendor of realty was not a false pretense—not because it did not represent a present fact, but rather because Littledale, J. thought that the vendee should be restricted to his action on the covenant of title. The purpose of this manifest distortion of authority to establish a proposition which had no bearing on the decision of the case before the Massachusetts court is not apparent. It is apparent, however, that it provided questionable support for Wharton's statement of the law. It is interesting to see how Wharton's representation, though false as to events past and then existing, proved quite adequate as a prediction.

When Wharton's sixth edition appeared in 1868, the text on the issue here under discussion remained substantially unchanged; but an American case was cited for the proposition that "any representation in regard to a future transaction is excluded."<sup>38</sup> The case was *Dillingham v. State*, an Ohio case decided in 1855.<sup>39</sup> The case is indeed a square holding for Wharton's dogma, and disposes of the issue of futurity in a single sentence, on the authority of a single case:

"In the construction of statutes like our own, this further proposition has come to be perfectly established—that the pre-

33. *Ibid.*

34. John Stuyvesant's Case, which is unofficially reported in a collection of "Interesting Trials and Decisions" by one Daniel Rogers, and which contains the first assertion to be found of Wharton's dogma: "A false pretence must be the false representation of some existing fact; and in this, a false pretence differs from a false promise." 4 City-Hall Recorder 156 (N.Y. City Gen. Sess. 1819). This decision preceded *Rex v. Goodhall* by two years and suggests the development of this limitation of false pretenses in New York quite independently of the main stream of Anglo-American authority.

35. 1 C. & P. 661, 171 Eng. Rep. 1358 (1825).

36. See note 9 and text *supra*.

37. *Regina v. Abbott*, 1 Den. C.C. 273, 169 Eng. Rep. 242 (1847).

38. WHARTON, AMERICAN CRIMINAL LAW 616 (6th ed. 1868).

39. 5 Ohio 280 (1855).

tense or pretenses relied upon must relate to a past event, or an existing fact; and that any representation or *assurance* in relation to a future transaction, however false or fraudulent it may be, is not, within the meaning of the statute, a false pretense which lays the foundation for a criminal prosecution. *Commonwealth v. Drew*, 19 Pick. 185." <sup>40</sup>

Thus had the bald and completely inaccurate dictum of *Commonwealth v. Drew* succeeded in "perfectly establishing" the law upon this issue.

Wharton had apparently overlooked an earlier decision,<sup>41</sup> probably the first *holding* by an American court of last resort that a representation as to future conduct is not indictable, the filial relationship of which to *Commonwealth v. Drew* is equally clear. The case was decided in Arkansas in 1851. McKenzie had sold a promissory note drawn in his favor to Palmer. He subsequently obtained possession of the note from Palmer by representing to him that he would assign it to him in writing and redeliver it, though he neither intended to, nor in fact did, either assign or return the note.

The conviction was reversed by the Supreme Court of Arkansas. Since no attack was made on the sufficiency of the evidence, and since this is not the type situation which would likely constrain the court to find an escape for the defendant, it seems fair to assume that the real basis of the decision was the doctrine recited. This approach is precisely that of *Commonwealth v. Drew*.

Although authority in addition to *Drew* is cited, it is largely the authority cited in *Drew*; and a comparison of the language of the Arkansas opinion with that of *Drew* leaves no doubt as to the paternity of the decision.<sup>42</sup>

40. *Id.* at 283.

41. *McKenzie v. State*, 11 Ark. 594 (1851).

42. The following excerpts from the two opinions show the relationship

"Any representation or assurance in relation to a future transaction, may be a promise or covenant or warranty, but cannot amount to a statutory false pretence. . . .

"The only case, *Young v. King*, 3 T. R. 98, which has been supposed to conflict with this doctrine, clearly supports it. The false pretence alleged was, that a bet had been made upon a race which was to be run. The contingency which was to decide the bet was *future*. But the making of the bet was *past*. . . ." *Commonwealth v. Drew*, 19 Pick. 179, 185 (Mass. 1837).

"Any representation or assurance in relation to a future transaction, may be a promise or covenant or warranty, but cannot amount to a statutory false pretence. . . .

"The only case, that has been supposed to conflict with this doctrine, is that of *Young vs. The King* (3 T. R. 98). But this case, when examined, is clearly in harmony with all the other cases; because it will be seen that the false pretence of the prisoner was that a bet *had been made* on a race that was to be run. The contingency that was to decide the bet was *future*; but the making of the bet was *past*. . . ." *McKenzie v. State*, 11 Ark. 594, 597-98 (1851).

A third case decided in the same decade as the two previously discussed, and decided quite clearly on the basis of the same authority, pushed the doctrine to its greatest extreme.<sup>43</sup> Magee was indicted for false pretenses on an indictment alleging the following: Magee had borrowed money from Williams on the strength of a representation that Black owed Magee money and would upon demand repay Williams the money the latter was lending to Magee. In fact, Black owed Magee nothing. The trial court quashed the indictment, and its judgment was affirmed by the Supreme Court of Indiana. The court reasoned that the representation that Black owed Magee money could not have been the sole inducement for the loan, and that if it were considered in conjunction with the assurance that Black would pay Williams the amount of the loan, the entire transaction was essentially promissory.<sup>44</sup> The opinion cites several authorities in addition to *Commonwealth v. Drew*, and concludes: "These authorities plainly show that any representation or assurance, in relation to a future event, may be a promise, a covenant or a warranty, but cannot amount to a statutory false pretense."<sup>45</sup> This conclusion is of course lifted verbatim from *Commonwealth v. Drew*.

The tracing of the spread of the dogma from jurisdiction to jurisdiction would be dull and needless. It is sufficient to say that it is virtually impossible today to find a decision which is not traceable, directly or indirectly, to the authority of *Commonwealth v. Drew*, *Rex v. Goodhall* or both. The main exceptions are some early decisions by lower courts in New York, where the rule appears to have developed independently;<sup>46</sup> and even in New York, the first decision of the issue by the highest court was based principally on the authority analyzed above.<sup>47</sup> As recently as 1935, when the problem first reached the Supreme Court of Hawaii, it was summarily resolved by reference to "but a few of the best considered" American and English cases, the first three cited after *Rex v. Oates* (which had nothing to do with representations as to the future) being *Rex v. Goodhall*, *McKenzie v. State*, and *Commonwealth v. Drew*.<sup>48</sup>

43. *State v. Magee*, 11 Ind. 154 (1858).

44. As Bishop pointed out, "It would be difficult to find in actual life any case wherein a man parted with his property on a mere representation of fact, whether true or false, without an accompanying promise." 2 BISHOP, CRIMINAL LAW 346 (9th ed. 1923). Modern authority appears unanimously to accept what Bishop characterized as the "correct rule," that prosecution for false pretenses is not defeated by a mingling of promises with factual misrepresentations so long as the victim puts some reliance on the latter in surrendering his property. *Frank v. State*, 244 Wis. 658, 12 N.W.2d 923 (1944); *Finlay v. State*, 152 Fla. 396, 12 So.2d 112 (1943); *State v. Neal*, 350 Mo. 1002, 169 S.W.2d 686 (1943).

45. *State v. Magee*, 11 Ind. 154, 155 (1858).

46. See note 34 *supra*.

47. *People v. Blanchard*, 90 N.Y. 314 (1882).

48. *Territory v. Toak*, 33 Hawaii 560 (1935).

It thus seems fair to conclude that an examination into the desirability of the dogma is in no sense an attack upon the wisdom of a carefully considered judgment of another day. It amounts rather to the brushing aside of an historical accident in order to consider, as of first impression, the issues which the facile repetition of the dogma has tended to conceal. Furthermore, investigation of official reaction to the dogma during the past 60 years supports the conclusion that an examination of its bases is long overdue.

### III. EVIDENCE OF OFFICIAL DISSATISFACTION WITH THE DOGMA

Of the relatively few jurisdictions which were not called upon to consider the dogma in connection with criminal fraud until it had been generally repudiated in the tort law of deceit,<sup>49</sup> two rejected it the first time it was pressed upon them. Disgust with its operation in a single case of obvious swindling produced its legislative repudiation in a jurisdiction which had earlier accepted it by judicial decision. Patent efforts at judicial circumvention of the dogma, which have enjoyed varying degrees of success, have marked its operation in the jurisdictions which were the first to adopt it. Consideration of these manifestations of judicial and legislative dissatisfaction with the dogma will provide an illuminating background for an independent appraisal of its desirability.

#### *A. Construction of Federal Mail Fraud Statute*

The first, and perhaps the weightiest, rejection of the dogma as a legislative principle, was by the United States Supreme Court in its construction of the federal mail fraud statute. As originally enacted in 1872, this statute made it a federal crime for any person to mail a letter in the execution of "any scheme or artifice to defraud."<sup>50</sup> One Durland was convicted of violating the statute under an indictment charging use of the mails to sell bonds on the strength of promises that they would be redeemed at fantastic prices, whereas in fact Durland did not intend to redeem the bonds. "Defraud" was not defined in the statute, but Durland contended on writ of error to the Supreme Court that the indictment alleged "only an intention to commit a violation of a contract," and thus there was "an absolute failure to describe a false pretense, which according to any decision of any court has ever been held to be either a civil or a criminal fraud."<sup>51</sup>

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49. See note 51 *infra*.

50. 17 STAT. 283, 323 (1872).

51. Brief for Plaintiff in Error, p. 13, *Durland v. United States*, 161 U.S. 306 (1896). His assertion was not strictly accurate, since there was an American

There is some suggestion in the opinion of Mr. Justice Brewer, writing for a unanimous Court, that the mail fraud statute created an entirely new criminal context, and that decisions under the false pretense statutes were therefore not strictly relevant:

"The statute is broader than is claimed. Its letter shows this: 'Any scheme or artifice to defraud.' Some schemes may be promoted through mere representations and promises as to the future, yet are nonetheless schemes and artifices to defraud."<sup>52</sup>

To the extent that this portion of the opinion supports the inference that the Court thought it was dealing with something essentially different from plans or attempts to obtain property by false pretenses, the affirmance of Durland's conviction is of course in no sense a rejection of the dogma that a representation as to the future cannot be a false pretense. However, a reading of the entire opinion clearly prohibits this inference. The Court's conclusion as to the content of the statute was that it "includes everything designed to defraud by *representations* as to the past or present, or suggestions or promises as to the future."<sup>53</sup> Thus it seems apparent that the Court interpreted the statute as essentially a false pretense statute,<sup>54</sup> but simply refused to accept the restriction of false pretenses which *Rex v. Goodhall* and *Commonwealth v. Drew* had engrafted onto the traditional offense of obtaining property by false pretenses. The basis of this refusal was not doctrinal, except that in order to reach the issue of the desirability of the traditional limitation, the Court was obliged to establish that it was not doctrinally *compelled* to adopt the limitation. This the Court did, first by demonstrating that the letter of the statute did not foreclose the issue, and then by so developing the purpose of the statute as to resolve the issue against the traditional restriction.

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decision as early as 1839 that deceit would lie for a false promise, *Fenwick v. Grimes*, 5 Cranch C.C. 603 (D.C. Cir. 1839), and a considerable number of decisions that false promises were sufficient fraud for purposes of rescission were handed down in the decade preceding the *Durland* case, see 51 A.L.R. 46 (1927) and cases cited at 63-66. However the leading American case establishing that a false promise was a sufficient basis for an action of deceit was not decided until four months after the Supreme Court decision in *Durland*, *Swift v. Rounds*, 19 R.I. 527, 35 Atl. 45, decided July 6, 1896 (*Durland* was decided March 2, 1896); and there were certainly no decisions at this time suggesting that "fraud" in any criminal context could embrace a promise made without intention to perform.

52. 161 U.S. 306, 313 (1896).

53. *Ibid* (Italics added).

54. There have been subsequent judicial efforts to substantially broaden the statute. See e.g., *Bradford v. United States*, 129 F.2d 274 (1942); *Shushan v. United States*, 117 F.2d 110 (1941). The only effort in this direction which has been reviewed by the Supreme Court was rejected in *Fasulo v. United States*, 272 U.S. 620 (1926). Although the Supreme Court may well decide ultimately that the statute goes beyond false representations, it is clear that the court which decided *Durland* had no such notion.

As to the letter of the statute, the Court pointed out that it is *possible* to defraud by false promises, and (on the authority of a dubious assertion in a previous Supreme Court opinion)<sup>55</sup> that criminal sanctions *had been* employed against false promises. Therefore, Congress might have intended to include this type of fraud within the mail fraud statute. Since the function of the statute is to protect the public against property deprivations accomplished through deception, and since a "specious and glittering promise" is a very effective means of accomplishing this evil, it would "strip the statute of value" to exclude this means from the reach of the statute. Therefore, Congress could not have so intended. Regardless of whether or not the Congress of 1872 had intended this construction, the Congress of 1909 expressly approved it by codifying the *Durland* decision in the Penal Code.<sup>56</sup>

### B. Common Law Cheats in Rhode Island

The only other American jurisdiction which appears never to have held that a false promise was not a criminal fraud is Rhode Island. In 1926, a self-styled second-hand automobile dealer named McMahon purchased automobiles from six different persons, in each instance paying but a small part of the agreed price in cash and giving short-term personal notes for the balance. He had no assets and no prospects of acquiring any; he kept no records of the notes he had given, and his memory of them was hazy; he closed his bank account shortly after giving the notes and left the state shortly before they became due. On appeal of the conviction as a common cheat, the Supreme Court of Rhode Island held that that State had received the English law of "common law cheats" as modified by the statute 30 GEORGE II,<sup>57</sup> since this statute had been enacted prior to the American Revolution; and that obtaining property by false representations of existing facts was thus a common law offence in Rhode Island. The rule that a present intention not to perform a promise is a present fact was held to be as applicable to a criminal prosecution as to an action for deceit. Since

55. In *Evans v. United States*, 153 U.S. 584, 592 (1894) the Court had said: "If [a person buys goods on credit] knowing that he will not be able to pay for them . . . this is a plain fraud and made punishable as such by statutes in many of the States." No authority is cited for this assertion, and no statutes of this period have been found which would support it.

56. The relevant portion of the section was amended to read: ". . . whoever having devised or intending to devise any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, etc.*" 35 STAT. 1130 (1909), as amended, 18 U.S.C. §1341 (1946) (added words are italicized). The change was in the Code submitted by the Commission appointed to prepare a draft. There was no comment on this change other than the citation of *Durland v. United States* in the margin of the Commission's report.

57. The false pretenses statute, note 11 and text *supra*.

there was sufficient evidence that McMahon had not intended to pay his notes at the time he gave them, the motion for a directed verdict was properly overruled.<sup>58</sup>

The relationship of this decision to the Wharton dogma is interesting. As pointed out above, the dogma in its original assertion was the generalization of a case holding that a promise made without intention of performing it was not a false pretense. The Rhode Island court applies the dogma—"misrepresentation of a present state of mind as to [intention not to meet a future obligation] is a false representation of an *existing* fact"<sup>59</sup>—but in its application it excludes in its entirety the original denotation of the dogma.<sup>60</sup> That is also essentially the approach taken by the California courts in their repudiation of the promissory fraud rule.<sup>61</sup>

### *C. Statutory Expulsion of Dogma in Nebraska*

The dogma received its first frankly legislative repudiation<sup>62</sup> at the hands of the Nebraska Legislature in 1947.<sup>63</sup> The existing-fact dogma had slipped into the law of Nebraska in 1904 with as little scrutiny as it has customarily received in its permeation of the Anglo-American law. *Dillingham v. State* was the only case cited, because "This rule is so well understood that it is unnecessary to cite any fur-

58. *State v. McMahon*, 49 R.I. 107, 140 Atl. 359 (1928).

59. *Id.* at 108, 140 Atl. at 360 (Italics added).

60. This indeed appears to have been the fate of the dogma generally with respect to the action of deceit. Thus an annotation in 51 A.L.R. 46, 49 (1927) sets out the following as the "general rule": "fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events." 13 pages of case citations follow, then an "exception" to the rule is asserted: "the weight of authority holds that fraud may be predicated on promises made with intention not to perform the same. . . ." Citations follow from nearly every jurisdiction, the cases dating for the most part later than 1885, the year of Lord Bowen's celebrated assertion in *Edgington v. Fitzmaurice*, that "the state of a man's mind is as much a fact as the state of his digestion."

61. The Supreme Court of California approved the rule that a false pretense cannot relate to a future event in a dictum in *People v. Wasservogle*, 77 Cal. 173, 19 Pac. 270 (1888). As recently as 1937, a conviction of obtaining property by false pretenses was reversed by a district court of appeals on the ground that the representations proved "looked to the future alone." *People v. Jackson*, 24 Cal. App.2d 182, 204, 74 P.2d 1085, 1097 (4th Dist. 1937). However, the same court six years later held that a promise made with the intention not to perform it supported a conviction of false pretenses, defendant's intention being a present fact. *People v. Ames*, 61 Cal. App.2d 522, 143 P.2d 92 (4th Dist. 1943). This case was followed by *People v. Gordon*, 71 Cal. App.2d 606, 163 P.2d 110 (2d Dist. 1945), and the latter decision has been cited with approval by the Supreme Court of California, *People v. Jones*, 36 Cal.2d 373, 377, 224 P.2d 353, 355 (1950).

62. The Louisiana Criminal Code of 1942 might be considered as entitled to this designation, since, according to the Annotations in Dart's edition of the Code, the new section dealing with "Misappropriation without violence" is intended to reach promissory fraud. LA. CODE CRIM. LAW & PROC. ANN. art. 740-67 (1943). It is not so treated here because the change is not expressly made.

63. Nebraska Laws, 1947, c. 99. NEB. REV. STAT. c. 28, § 28-1207 (Cum. Supp. 1947).

ther authorities to support it.”<sup>64</sup> Some forty years later, one Hameyer conceived a gross fraud which he nearly managed to keep within the area of criminal immunity provided by the dogma. He represented to a farmer named Woebbecke that for \$1,600 he could procure an oil and gas lease on some property located in Oklahoma, and that Woebbecke could resell the lease within three months to another buyer for \$32,000.<sup>65</sup> As is pointed out in the *Durland* opinion, “any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all,”<sup>66</sup> and Woebbecke was no exception. He gave Hameyer \$1,600, and when the latter returned a few weeks later requiring an additional \$1,800 “to clear up some title,” Woebbecke again disgorged. On two subsequent visits, Hameyer obtained an additional \$4,000, but he made the mistake of delivering a fake lease to Woebbecke on the third visit. When Hameyer was subsequently brought to trial under an information in four counts, one based on each of his visits to Woebbecke, the first two counts were dismissed on the basis that the only allegedly false representations made on these occasions related to future transactions. Convictions were permitted on the last two counts, apparently because the fake lease related to an existing fact, but Hameyer appealed from the refusal of the trial court to quash the last two counts.

Pending the appeal, a bill was introduced in the legislature to amend the false pretense statute expressly to include representations “as to some future action to be taken by the person making the representation where made with the present intent that such future action would not be performed. . . .” At the Judiciary Committee hearing on this bill, which was subsequently passed without opposition, it was pointed out that had Hameyer not returned for his third visit, he would have succeeded in bilking Woebbecke of \$3,400 without having committed a criminal fraud under the accepted construction of the false pretense statute.<sup>67</sup>

Six months after the amendment of the statute, the Supreme Court filed an opinion on Hameyer’s appeal which suggested that the trial court had improperly dismissed the first two counts of the information, and that perhaps the statutory amendment had been unnecessary.<sup>68</sup> The Court was of course bound by its prior adoption of the existing-

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64. *Cook v. State*, 71 Neb. 243, 245, 98 N.W. 810, 811 (1904).

65. These facts are taken from the testimony of Harold Johnson, Assistant Director and Counsel of the Department of Banking of the State of Nebraska, before the Judiciary Committee of the Nebraska Legislature on February 26, 1947, during its hearing on L.B. 242.

66. *Durland v. United States*, 161 U.S. 306, 313 (1896).

67. Testimony of Harold Johnson, note 65 *supra*.

68. *Hameyer v. State*, 148 Neb. 798, 29 N.W.2d 458 (1947).



fact dogma, but Hameyer's representations were "interpreted in the light of what a person of average intelligence and lay understanding would construe them to mean. . . ." <sup>69</sup> Thus the representation that Hameyer could procure an oil and gas lease on certain land meant that he "had a present and existing ability to procure a lease on lands referred to for \$1,600." <sup>70</sup> His assurance that the lease could be resold for \$32,000 within three months amounted to a representation that "the defendant had a commitment for the purchase of the lease for \$32,000. . . ." <sup>71</sup> Thus both were false pretenses under the statute, and since both were made to Woebbecke on Hameyer's first visit, it would seem that the first two counts of the information should not have been quashed. It may be seriously questioned, however, that the Supreme Court would have refused, as it expressly did, to "indulge in strained or technical refinements the effect of which might be to defeat the purposes of law and the ends of justice" had not the legislature seriously shaken the hypnotic influence of the dogma of *Commonwealth v. Drew*.

#### *D. Judicial Gutting of Dogma in Massachusetts*

Although the Supreme Judicial Court of Massachusetts was the original importer of the promissory fraud dogma, if not its manufacturer in collaboration with Wharton,<sup>72</sup> it seems fairly clear that it has succeeded in completely exorcising the dogma from Massachusetts. There appears to have been no reversal of a conviction for false pretenses in Massachusetts on the basis of the dogma since 1910,<sup>73</sup> and a case decided in 1950 strongly indicates that there will be none in the future. In the early 'forties, one Green collected several thousand dollars from three victims on the strength of representations that an investment trust was to be set up which would produce substantial profits to contributors by large-scale buying and selling of stocks. Green was convicted of false pretenses on evidence that no trust fund had been set up or even seriously contemplated. He contended on appeal that there was no evidence of any misrepresentation of an existing fact. The current vitality of the promissory fraud dogma in Massachu-

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69. *Id.* at 801, 29 N.W.2d at 461.

70. *Ibid.*

71. *Ibid.*

72. See text at note 6 *et seq.*, *supra*.

73. *Commonwealth v. Althause*, 207 Mass. 32, 93 N.E. 202 (1910). Although the court asserted that Althause was innocent of false pretenses as a matter of law, since he had obtained *no property* by fraud, the defendant had not raised that issue at the trial and the reversal was based on error in the charge as to a false promise as a false pretense.

setts is indicated by the Supreme Judicial Court's perfunctory dismissal of this contention:

"It is clear . . . that his statements concerning the present accumulation of a fund *for the purpose of forming* an investment trust were statements of fact. Further, the representations that the moneys contributed were to be invested in this fund were statements of fact *as to the intention* of those collecting for the fund." <sup>74</sup>

This decision is of course at the opposite pole from the position taken in *Commonwealth v. Drew*. The process by which this 180 degree swing was effected is outlined by the four cases cited by the court in support of the propositions quoted. The first of these, *Commonwealth v. Walker*,<sup>75</sup> sustained a conviction of conspiracy to violate a special fraudulent theft statute enacted in 1863.<sup>76</sup> The statute provided a maximum punishment of five years imprisonment for obtaining property "under false color and pretence of carrying on business, and dealing in the ordinary course of trade . . . with intent to defraud." In both the *Walker* case, and a second *Drew* case,<sup>77</sup> in which a conviction of direct violation of this statute was affirmed, it was held that the intention of the defendant to use the property obtained otherwise than in his regular business was central to the fraud defined by the statute.

"The act of purchase, in its external features, is the same whether it is in the ordinary course of dealing, or a wrongful procurement of property with intent to defraud. The intention of the purchaser in reference to the disposition of the goods makes it the one or the other . . . Under this section, therefore, [his statement of that intention] must be held to be a statement of a fact, and not a promise, or a mere expression of a purpose."<sup>78</sup>

The second case cited in *Green* was *Commonwealth v. Morrison*,<sup>79</sup> decided in 1925. Morrison had had a supply of obsolete spark plugs. Having left a sample of these plugs with one Ramsdell, he had an accomplice place a large order for these plugs with Ramsdell, paying a cash deposit and arranging that the plugs be shipped to a fictitious address C. O. D. Morrison then insisted upon and received cash pay-

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74. *Commonwealth v. Green*, 326 Mass. 344, 348, 94 N.E.2d 260, 264 (1950) (Italics added).

75. 108 Mass. 309 (1871).

76. MASS. GEN. LAWS c. 248, § 2 (1863).

77. *Commonwealth v. Drew*, 153 Mass. 588, 27 N.E. 593 (1891).

78. *Id.* at 594-95, 27 N.E. at 594.

79. 252 Mass. 116, 147 N.E. 588 (1925).

ment from Ramsdell before shipping the plugs to the address given by the accomplice, whence they were returned unclaimed two weeks later to Ramsdell. In *Commonwealth v. Althause*, decided 15 years earlier, the Massachusetts court had pointed out that *Walker* and the second *Drew* case were decided under a special statute concerned with a false pretence of "dealing in the ordinary course of trade."<sup>80</sup> This distinction was apparently abandoned in *Morrison*, however, for the defendant was convicted simply of "obtaining money of Ramsdell by false pretenses;" and in affirming the conviction, the court cites *Walker* for the flat proposition that "A misrepresentation as to a person's present intent may be a false pretense."

Support for this proposition in *Morrison* was drawn, significantly, from a second source—the tort law of deceit. The opinion in *Commonwealth v. Althause* had conceded, "as a general proposition of law apart from statutes making it a crime to obtain property by a false pretense," that present intention as to a future act was a present fact.<sup>81</sup> The case held, however, that buying goods with the intention not to pay for them was not, "as a matter of construction of the statute creating it, the crime of obtaining property by a false pretense."<sup>82</sup> Between the *Althause* and *Morrison* decisions, it was squarely held, apparently for the first time in Massachusetts, that the misrepresentation of an intention to pay for goods purchased on credit was actionable deceit.<sup>83</sup> The citation of this decision coordinately with *Commonwealth v. Walker* for the proposition that misrepresentation of present intention may be a "false pretense" strongly suggests the rejection of the "double standard" insisted upon in *Althause*.

Thus by simply failing to advert to them, the court put to rest the two distinctions upon which it had based its reversal in *Althause*. Since the gist of *Morrison*'s offense was that he did not intend to pay for the spark plugs he caused to be ordered from Ramsdell—certainly the entire transaction would have been simply a practical joke had the defendants intended to pay—circumvention of the *holding* in *Althause* required a more direct approach. It was hardly sufficient to say, as indeed the court did say, that "the facts in *Commonwealth v. Althause* . . . make it inapplicable to the case under consideration." This difficulty was by-passed by the ingenious inference of an intention "to make a genuine contract" which necessarily accompanies a contract to buy goods and to which the intention to pay for the goods "is merely

80. 207 Mass. 32, 50, 93 N.E. 202, 208 (1910).

81. *Id.* at 47, 93 N.E. at 206.

82. *Id.* at 49, 93 N.E. at 207. As explained in note 73 *supra*, the conviction was patently improper on other grounds not raised by the defendant, and the court may well have felt obliged to stretch a point to find reversible error in the instruction excepted to.

83. *Donovan v. Clifford*, 225 Mass. 435, 114 N.E. 681 (1917).

incidental." Since the jury could have found the misrepresentation of this intention, defendants' motions for directed verdicts were properly denied.

The significance of the two other cases cited in *Commonwealth v. Green*, in charting the expulsion of the promissory fraud dogma from Massachusetts, is that they cut off potential limitations which obviously inhered in the "genuine contract" theory of the *Morrison* opinion. Subsequent decisions might have treated as material the use by *Morrison* of a "phantom" accomplice to make the contract of purchase with the victim. Since the accomplice used a fake address and thus made himself inaccessible to civil process, he manifested himself unwilling to be bound in any sense by the contract he made with the victim. The cases of *Commonwealth v. McKnight*<sup>84</sup> and *Commonwealth v. McHugh*<sup>85</sup> have neither availed themselves of this basis for distinction nor shown any other tendency to restrict the new rule that false pretenses include misrepresentations of intention.

With respect to the indictability of misrepresentations of intention, both opinions cite *Walker* without reference to the fact that it was decided under a special statute, and both cite civil fraud cases interchangeably with criminal cases.<sup>86</sup> Furthermore, the *McHugh* case involved essentially a misrepresentation of intention to pay for property purchased on credit, and the application of the *Morrison* doctrine to its facts indicates that the "intention to make a genuine contract" is as broad as "intention to pay." *McHugh* bought a house from his victim for \$6,500. The terms were \$3,000 in cash, the balance to be secured by a second mortgage subject to a first mortgage in such amount as *McHugh* could borrow on the security of the house. *McHugh* borrowed \$4,000 from a bank, made the down payment out of the proceeds and made off with the balance. *McHugh's* conviction of false pretenses was sustained, the court asserting that there was sufficient evidence to support a finding that defendant had "designedly misled Mrs. Thompson into believing that he was making a genuine contract with her for the purchase of her property, when in fact he was employing the contract as a sham and a device to defraud her . . . by posing as one who was honestly interested in the purchase of her premises."<sup>87</sup>

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84. 289 Mass. 530, 195 N.E. 499 (1935).

85. 316 Mass. 15, 54 N.E.2d 934 (1944).

86. This tendency to fuse the civil and criminal fraud rules is the more significant in view of the recent retreat of the Massachusetts Court from the rather urbane attitude toward civil fraud which it had formerly taken. See *Kabatchnic v. Hanover-Elm Building Corp.*, 103 N.E.2d 692 (Mass. 1952).

87. 316 Mass. 15, 22, 54 N.E.2d 934, 938 (1944). The facts of the case have been somewhat simplified by the elimination of the joint defendants. The essence of the transaction is accurately described, however.

Doubtless a forthright overruling of *Althause* would be preferable to this circumlocution, but it could hardly more conclusively establish that misrepresentation of an intention to pay is a false pretense in Massachusetts. Certainly the assertions that McHugh did not intend "making a genuine contract," or was not "honestly interested in the purchase of her premises" are disingenuous. In order to borrow money from a bank on the security of the premises, McHugh *had* to make a genuine contract for their purchase. He was "honestly interested" in their purchase for this very specific purpose. He was simply not interested in paying for them, and that was the substance of his fraud.

#### IV. EVIDENCE OF OFFICIAL AMBIVALENCE IN NEW YORK

These outright, if not uniformly forthright, repudiations of Wharton's dogma are persuasive evidence that the limitation it imposes upon the crime of false pretenses is not a satisfactory one. The reaction of the New York courts and legislature against the dogma is merely cumulative on that score. It deserves independent consideration, however, because it demonstrates the continuing toughness of the dogma as "black letter law," while suggesting a possible technique for compromising with the dogma, which technique requires examination. The technique is to throw the crime of larceny by trick into the breach in the law of theft by fraud which is opened by the promissory fraud rule.

Although some legal scholars have treated larceny by trick as closely related functionally to false pretenses,<sup>88</sup> or even as completely engulfing it,<sup>89</sup> the offenses are respectively aimed at quite different acquisitive techniques. False pretenses is theft by deceit. The misappropriation it punishes must be effected by communication to the owner. Larceny by trick is theft by stealth. It punishes misappropriation effected by unauthorized disposition of the owner's property. The former focuses on defendant's behavior while face to face with the owner: did it amount to a false pretense? The focus of the latter is upon defendant's behavior behind the owner's back: did it amount to an unauthorized appropriation?

One cause of confusion of the offenses is that larceny by trick requires some deceit in addition to the unauthorized disposition of property which is its gravamen. It is thus thought of as a type of theft by

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88. MICHAEL AND WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* 415 (1940), under the heading *Acquisition by Fraud*, include as a single sub-head, *Larceny by Trick and False Pretenses*.

89. "Larceny has conquered the whole domain of false pretenses. There is no longer any borderland between larceny and false pretenses, for everything in that direction is larceny." Beale, *The Borderland of Larceny*, 6 HARV. L. REV. 244, 256 (1892).

fraud. However, the requirement of deceit in larceny by trick stems from its history rather than its function and plays a minor rôle. At the time of *Pear's Case*,<sup>90</sup> the decision of which created larceny by trick, there was no crime of embezzlement. The only fully matured form of theft was larceny, which required a taking *from the possession of another*. The judges had previously broken through this limitation to reach misappropriations by servants in possession of their masters' property and by bailees who "broke bulk." In each case the breakthrough was verbally harmonized with the requirements of larceny by the formula of "constructive possession." The servant had mere "custody," while possession remained "constructively" in the master. Although the bailee initially had possession, it reverted "constructively" to the bailor when the bailee broke bulk. *Pear's Case* effected a third extension of larceny to reach, as a "constructive taking by trespass," an unauthorized appropriation of property in the physical possession of the defendant.

Pear hired a horse, contracting to return it at the end of the day. During the day, he sold it. A jury found specially that he had intended, at the time he hired the horse, to sell it. He was held guilty of larceny. Verbal harmony with the requirements of larceny was maintained by the assertion that Pear's fraud, *i. e.*, apparently, his omission to inform the owner of his plan to sell the horse, defeated the transfer of "possession" of the horse to Pear. Thereby "it remained unaltered in the prosecutor at the time of the conversion. . . ." <sup>91</sup>

It should be apparent that deceit had little to do with the offensiveness of Pear's behavior. It can hardly be said that being a servant is offensive, yet being a servant plays the same role in larceny by servants as deceit plays in larceny by trick. Each permits a circumvention of the requirement of a "trespassory taking" in order to reach a misappropriation by a person in possession as common law larceny. Fraud for this highly technical purpose need not be subjected to close scrutiny or held to an exacting standard, for there is adequate external evidence of the defendant's antisocial bent in his subsequent misappropriation. Indeed it is true generally, as it was in *Pear's Case*, that the only substantial evidence of the initial fraud is found in the subsequent unauthorized appropriation.

In contrast, the antisocial act defined by the crime of false pretenses consists entirely of deceit. It consists of so deceiving the owner of the property that he is induced to consent to the defendant's treating the property as his own. This being so, it is unnecessary as well as

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90. See note 14 and text *supra*.

91. 1 Leach 253, 254 (3d ed. 1800), 168 Eng. Rep. 208 (1779).

impossible for the defendant to subsequently misappropriate property which he has stolen by false pretenses. If the behavior by which he induced consent amounts to a false pretense, he has completed this form of theft at the moment the bargain is struck. On the other hand, if his behavior does not amount to a false pretense, he is privileged to dispose of the property as he sees fit, and nothing he does with it can amount to a misappropriation. He may have committed such fraud short of false pretenses as will give the owner the right to rescind the transaction, but until the owner asserts this right, the property is the defendant's. When the right is asserted, it is based rather on defendant's deceit than his subsequent behavior with respect to the property.

Thus it is said that a defendant cannot be convicted of larceny if his deceit induces the owner to transfer his entire interest in the property, whereas he can be if it induces consent merely to his possession or use of the property. This creates the often troublesome paradox<sup>92</sup> that larceny punishes the lesser fraud and exempts the greater. The apparent contradiction disappears with the realization that larceny by trick does not punish *deceit*—it punishes unauthorized appropriation. This functional distinction between larceny and false pretenses suggests a simple test by which specific fact situations can be distributed between the two offenses. If the deceit be eliminated from the transaction by which the property initially came into the defendant's hands, would his subsequent behavior with respect to the property constitute a conversion? If so, the offense may be larceny by trick; it cannot be false pretenses. If not, the offense may be false pretenses; it cannot be larceny by trick.

The first blurring of this distinction in New York appears to have occurred in the case of *Loomis v. People*.<sup>93</sup> Loomis' accomplice, Lewis, struck up an acquaintance with one Olason on a train travelling to New York. Upon their arrival, Lewis and Olason registered at the same hotel, and Lewis took Olason with him to cash a \$500 check. As the bank was not yet open, Lewis took Olason into a bar to pass the time. Loomis was waiting for them there. Lewis and Loomis began shaking dice for small stakes, and Lewis' "luck" was phenomenal. Loomis feigned the disgruntled and desperate loser and challenged Lewis to shake for \$100. As Lewis had but \$10 aside from his check, he asked Olason for \$90. "I am sure to beat him again, and you can have your money back. If I do lose I have got the check for \$500, and

92. See, e.g., PARLIAMENTARY COMMISSIONERS' REPORTS, FIRST REPORT OF THE COMMISSIONERS ON CRIMINAL LAW 8 (1834) ("It would seem that if, by reason of fraud, a temporary interest would not pass, no sufficient reason can be assigned why the entire interest should pass.").

93. 67 N.Y. 322 (1876).

we will go to the bank and get the check cashed, and you can have the money." Upon this assurance, Olason gave Lewis \$90 which Loomis won. Lewis thereafter lost the \$500 check to Loomis, and, declaring that he was "not worth a cent," disappeared.

It is perfectly clear on these facts that Lewis and Loomis were guilty of obtaining property by false pretenses. The entire "gambling" game was a fake, as was the \$500 "check." On the strength of Olason's induced belief that both were genuine, he lent \$90 to Lewis. After Lewis had lost the \$90, he appears to have regretted the loan, for he asked to have the money returned immediately and he refused an additional \$100 loan requested by Lewis. But the transaction nonetheless appears to have been a loan which made the \$90 Lewis' and gave Olason in exchange a right to repayment of a like amount. Thus "title" and not mere "possession" was transferred, and the gist of the offense was in the means of obtaining the money rather than in the defendant's subsequent behavior with respect to it. In terms of the test suggested above, had the \$500 check been genuine and had the dice game between Lewis and Loomis been a genuine "adversary proceeding" between strangers, as by their behavior they represented it to be, no one would contend that Olason would have had a right to object to Lewis' surrender of the \$90 to Loomis or to Loomis' refusal to return it to Olason. Olason might have objected to the subsequent wager and loss of the check, on the ground that he had a security interest in it, but there is no evidence that he did object to that.

Loomis and Lewis were nevertheless indicted for larceny, and convicted under a charge that the offense was larceny if "the complainant did not intend to part with his ninety dollars absolutely but only for a short time and only until Lewis could get the check or pretended check cashed. . . ." <sup>94</sup> The conviction was affirmed, the Court of Appeals holding that the evidence clearly supported the verdict. Although the quoted portion of the charge was excepted to, the court never specifically adverted to it except by the assertion that "there was no error in the charge." The distinction between larceny and false pretenses was circumvented as follows:

"It [the money] was handed over for a particular purpose, *with no intention to loan it*, or absolutely to surrender the title, and it was only in case of its loss that other money was to be procured upon the check, which the prisoner Lewis claimed to have in his possession. . . . Certainly, when it appeared that no loss had happened, the temporary possession was at an end, and to all intents and purposes the money reverted to the prosecutor." <sup>95</sup>

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94. *Id.* at 324.

95. *Id.* at 326-7 (Italics added).



This is an ingenious construction of the transaction, but there was no evidence to support the assumed fact that there was no loss, *i. e.*, that the fall of the dice was not actually in Loomis' favor, and certainly the jury was not required, in order to convict under the charge, to find that Olason had not intended to loan the money. The jury was told to convict if Olason intended to part with his money "only until Lewis could get the check or pretended check cashed." This would clearly amount to a loan, and since that is the most obvious interpretation of the transaction, it is probably the finding on which the jury based its verdict. Possibly the prosecutor and the courts felt that the penalty for false pretense was inadequate for these offenders.<sup>96</sup> Or perhaps the prosecutor and trial court simply bungled, and the appellate courts declined to give these defendants the benefit of a technical distinction. They were patently professional swindlers, as the report of the Court of Appeals decision indicates. When the defendants were arrested, Loomis had a role of bills marked "\$500" which, reading from the outside in, consisted of a one dollar treasury bill, a five dollar bank-note, a Confederate twenty-dollar bill, and several pieces of brown paper. He also had five counterfeit twenty-dollar coins, and Lewis had a three-card monte deck. In addition to these "properties," the plan by which they bilked Olason gave strong evidence of professionalism. Thus do easy cases make bad law, for when it is obvious that a defendant is a criminal, it becomes less important how he is convicted, or of what crime.

Since this "special legislation" for Loomis and Lewis was couched in terms of general doctrine, it is not unnatural that there would be subsequent prosecutions of doctrinally identical offenses, but of offenders who did not possess the personal qualifications of Loomis and Lewis. Thus three years later, the larceny conviction of a business man of questionable ethical standards reached the Court of Appeals. An Ohio maltster named Schelly had entered into an arrangement with the defendant, Zink, that the latter would sell Schelly's malt in New York City at a specified price. In their first transaction, Schelly had shipped two car loads of malt to a New York brewer who refused to accept them. Schelly authorized Zink to take over the bills of lading and dispose of the malt, at the specified price, which Zink purportedly did. It subsequently developed that he had sold the malt at prices substantially below those authorized, and instead of cash he sent Schelly a sixty-day note for the amount due. Schelly shipped a total of thirteen car loads of malt to Zink. Their understanding was that Zink was to

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96. At this time false pretenses carried a maximum penalty of three years, while larceny was punishable by five years. 3 N.Y. REV. STAT. 948, 953 (1875).

sell the malt and return Schelly the sale price less freight. How Zink was to be compensated does not appear. In each case, a bill of sale and a bill of lading were made to Zink, who sold the malt at less than the agreed price, and paid Schelly by promissory notes for amounts equal to the agreed price. Although it does not so appear in the report of the case, it may be assumed that these notes were never paid, and since one of them was made by a person who bought no malt from Zink, it may be questioned whether they were genuine. This aspect of the transaction was not emphasized, because Zink was tried and convicted of larceny of the malt.

The Court of Appeals reversed the conviction, asserting that the jury should have been told that "if Schelly authorized Zink to sell the property to others, he could not be convicted of [larceny]." <sup>97</sup> Since Schelly himself testified that he had authorized Zink to sell the malt, this instruction would have amounted to a directed verdict of acquittal. Thus in a case lacking the strong pull to conviction found in the *Loomis* case, the Court of Appeals reestablished, for the crime of larceny, the requirement that there be an unauthorized appropriation—some behavior *with respect to the property* inconsistent with the owner's rights *in the property*. The deceit by which the defendant had induced the owner to consent to a sale of his malt was not to be twisted into a conversion. Two years later, a factor which possibly contributed to the *Loomis* case was eliminated when the legislature equalized the penalties for larceny, false pretenses, and embezzlement. <sup>98</sup> However, the *Loomis* case was still on the books, and a new motive for blurring the distinction between false pretenses and larceny arose.

The fraud in a true case of larceny by trick plays a minor technical role, as has been pointed out above, and it consequently has been easily found. <sup>99</sup> Thus it appears never to have been questioned that a promise made without intention of performance would suffice for this purpose. Therefore, when a gross fraud is perpetrated by means of false promises, there is a strong urge for the prosecutor to take the case out of the false pretense category, where the sharply defined existing-fact dogma precludes conviction, and work it into the penumbra of larceny created by cases like *People v. Loomis*. The case of *People v. Miller* <sup>100</sup> is a particularly satisfactory illustration of this phenomenon because the Court of Appeals not only succumbs to this prosecutor's urge but—either candidly or naively—expressly acknowledges it as the basis for affirming a conviction.

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97. *Zink v. People*, 77 N.Y. 114, 120 (1879).

98. N.Y. PENAL LAW § 1290.

99. See text at note 91 *et seq. supra*.

100. 169 N.Y. 339, 62 N.E. 418 (1902).

Miller's fraud was much like that of Durland, whose conviction, as was explained above,<sup>101</sup> established promissory fraud to be punishable under the federal mail fraud statute. He let it be known that he had means of realizing tremendous profits by speculation on the stock market, but that he needed capital for his operations. He advertised widely and interested hundreds of people in providing him with capital by promising a return of ten per cent per week on money turned over to him, while guaranteeing against loss. After eight months of operation, Miller had taken in \$1,156,000. Although he managed to maintain the fantastic interest payments promised, the only speculation in which he had engaged was the deposit of \$1,000 with a brokerage firm as margin for stock purchases, which had resulted in a loss of \$994.64.<sup>102</sup> The scheme collapsed when its nature was exposed by the newspapers. Miller fled to Canada, having drained some \$300,000 from the enterprise.

The difficulty in prosecuting Miller was that although he patently had no intention of repaying the bulk of the money he obtained, his representations to the contrary were promissory and consequently not indictable as false pretenses. He was therefore indicted for and convicted of larceny. The Appellate Division reversed the conviction on the ground that Miller had, by his representations, induced his victims to surrender their entire interest in the funds turned over to him, accepting in return a credit, and that his offense was therefore false pretenses or nothing. Since the form of the transaction was the purchase of shares in Miller's enterprise, and since the purchasers were given no control whatever over Miller's use of the funds, and the speculation was to be entirely at his risk, it would seem clear that this decision was technically unimpeachable.<sup>103</sup> However, the Court of Appeals reversed the order of the Supreme Court and affirmed the conviction of larceny.

The technical argument is dubious: the complainant "did not intend to loan [the money to the defendant] or to vest him with the

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101. See text at note 51 *et seq. supra*.

102. The facts are taken from the dissenting opinion of Goodrich, P. J. in the Supreme Court, *People v. Miller*, 64 App. Div. 450, 461, 72 N.Y. Supp. 253, 260 (2d Dep't. 1901).

103. The receipts given to the prosecuting witness for the funds obtained from her read as follows:

"Received . . . the sum of One Hundred Dollars (\$100.00) for a Ten Share interest in the Franklin Syndicate; principal guaranteed against loss, and may be withdrawn at any time, upon one week's notice and the return of this receipt; dividends payable weekly in sums of One Dollar and upwards per share until principal is withdrawn."

"Received . . . the sum of One Thousand Dollars, for an interest in the Franklin Syndicate; principal guaranteed against loss by surplus, and can be withdrawn at any time, upon one week's notice and the return of this receipt, 10 per cent. interest paid weekly on this deposit until principal is withdrawn."  
*People v. Miller*, 64 App. Div. 450, 474, 72 N.Y. Supp. 253, 268-69 (2d Dep't 1901).

title, but with the custody only, and that for a specific purpose." <sup>104</sup> Although it is indisputable that Miller's misrepresentation of his purpose in borrowing the money was essential to his securing of the loans, it is equally clear that what he secured was loans rather than an authority to purchase stock on behalf of his victims as the conclusion of the Court of Appeals intimates. What a borrower does with the money he borrows cannot be a conversion of the money. It may be evidence that he practiced deceit in procuring the loan, but his offense is deceit rather than conversion. To buttress its questionable interpretation of the transaction, the court manipulated previous decisions on the distinction between false pretenses and larceny in a manner which was patently disingenuous.

The *Zink* case was said to be distinguishable: the complainant there clearly intended to part with title, because otherwise the contemplated transaction, which involved a sale and delivery of the malt to third parties, could not have been effected. The court does not indicate how the transaction contemplated by Miller's dupes, *i. e.*, the purchase and sale of stocks with money furnished by the dupes on Miller's account and at his risk, could be accomplished without the entire interest in the money passing to Miller. On the other hand, Miller's offense was said to be indistinguishable "in any essential respect" from the following: One Lawrence induced a street railway company to put two trolley cars into his possession on the strength of a promise to install electric motors in them and return them to the company. He sold the cars while they were thus in his possession and was convicted of larceny.<sup>105</sup> The court passes over the obvious fact that Lawrence's behavior was a patent conversion of the trolley cars, and that this conversion was the only evidence of deceit in securing the contract to work on the cars. It emphasizes that Lawrence's and Miller's offense have one basic factor in common: "In both cases the fraudulent device consisted in deceiving the owner of the property, *not as to any existing fact*, but with respect to intentions as to future operations with the property."<sup>106</sup> Thus a factor which is considered exculpatory in the crime of false pretenses is treated as incriminating in larceny. This theme appears elsewhere in the opinion and doubtless explains the decision.

It is asserted unmistakably in the answer of the Court of Appeals to the contention of the Supreme Court that defendant was guilty of false pretenses *or nothing*:

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104. *People v. Miller*, 169 N.Y. 339, 354, 62 N.E. 418, 421 (1902).

105. *People v. Lawrence*, 137 N.Y. 517, 33 N.E. 547 (1893).

106. *People v. Miller*, 169 N.Y. 339, 353, 62 N.E. 418, 423 (1902) (*Italics added*).

"It is very doubtful, however, if such a charge could be sustained by the proof in this case. . . . It would be difficult to show that the defendant . . . made any material false statement concerning any existing fact. . . . These statements were all in the nature of promises, and although *they were very effective in producing the result desired by the defendant*, they would hardly constitute the basis for a criminal charge of obtaining money by false pretenses."<sup>107</sup>

The Court of Appeals refused to consider the alternative suggested by the Supreme Court—that Miller was guilty of nothing. Miller was held guilty of larceny, not because his behavior constituted the conversion required by that offense, but rather because it did *not* constitute the type of deceit necessary for conviction of false pretenses. The reason behind this questionable logic stands out in the italicized portion of the above quotation: false promises are a very effective swindling technique, and as the United States Supreme Court pointed out in the *Durland* case, to exclude them from the reach of a statute directed against fraud is to emasculate the statute. Since the Court of Appeals had firmly committed itself to this emasculation of its false pretense statute twenty years previously,<sup>108</sup> it seized upon this distortion of the offense of larceny by trick to reinvigorate the law of criminal fraud in New York. But difficulties inhered in this solution of the problem.

The admitted reason for holding Miller's behavior criminal was that it was an obvious fraud which could not be reached by the crime of false pretenses. The technique was to hold that his fraud had induced his victims to intend to surrender mere possession as distinguished from title or ownership, which technique depended upon a specious analysis of the transaction by which the property was surrendered. But even this specious analysis cannot be applied to every situation in which there is an obvious fraud not reached by the false pretense statute. The analysis must produce the preliminary conclusion that the victim surrendered his property for a "specified purpose." If the fraud relates to some behavior of the defendant other than his intended use of the property surrendered, there is nothing from which the court can spin the slender thread from which it hung its conclusion in *Loomis* and *Miller* that there was no intention on the part of the victim to transfer title. It might have been anticipated therefore that

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107. *Id.* at 351, 62 N.E. at 422 (Italics added).

108. Although this court had applied the existing-fact doctrine as early as 1860, *People v. Ranney*, 22 N.Y. 413 (1860), this position was re-examined and adhered to in *People v. Blanchard*, 90 N.Y. 314 (1882) on the strength of the overwhelming weight of authority in cognate jurisdictions.

the adoption of this device to reach promissory fraud would occasionally be frustrating. An additional difficulty inherent in the device is its tendency to confuse.

If the fact that the defendant had obtained property for a "specified purpose" were in fact central to criminality under the New York version of larceny by trick, Zink would have been much more eligible for conviction than Miller. He had received the malt from Schelly for the sole purpose of selling it at specified prices, the purchase price to be returned to Schelly. Miller, on the other hand, was given money for use in speculation on his own account, at his own risk, and with no limitations on what he should buy or how much he should pay for it. In concluding that Zink's victim had intended to transfer title while Miller's had not, the Court of Appeals articulated no intelligible standards by which prosecutors and lower courts could subsequently anticipate which conclusion the Court would reach on a particular set of facts.

The potentiality of this development of the law of New York both to confuse and to frustrate is illustrated by the case of *People v. Noblett*.<sup>109</sup> Noblett represented to the complaining witness that the lease under which he occupied an apartment had two years to run and that if the complaining witness would pay him \$550 on March 13th, he would surrender possession of the apartment to the complaining witness for the period from March 20th to June 1st. He apparently indicated that he needed the money in advance to pay arrears in rent on the apartment. The complaining witness accepted Noblett's offer, the money was apparently used by Noblett to pay arrears in rent, but Noblett never surrendered possession of the apartment. He was indicted in two counts, one charging larceny, the other, obtaining property by false pretenses.<sup>110</sup> The false pretense count alleged only the representation that Noblett had two years remaining on his lease of the apartment, whereas in fact the term of his lease had already expired. The trial court dismissed this count on the ground that misrepresentation was immaterial, since the New York Rent law gave Noblett the right to possession of the apartment for a period longer than that for which he had

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109. 244 N.Y. 355, 155 N.E. 670 (1927).

110. Actually, under the New York statute both the traditional offenses of larceny and false pretenses are called "larceny." The relevant language of the statute at the time of the *Noblett* case was as follows: "A person who . . . takes from the possession of the true owner . . . ; or obtains from such possession by color or aid of fraudulent or false . . . pretense . . . ; any money . . . or article of value of any kind; . . . Steals such property, and is guilty of larceny." N.Y. PENAL LAW § 1290.

The meaning of the text sentence is that one count of the *Noblett* indictment was couched in terms of "taking from the possession" and the other in terms of "obtaining by false pretense."

agreed to rent it to the complaining witness. Conviction under the larceny count was permitted; this judgment was unanimously affirmed by the Appellate Division; and Noblett appealed to the Court of Appeals, contending that he could not be guilty of larceny since he had obtained unconditional title to the \$550 at the time of its delivery by the complaining witness.

The appeal brought the New York court to a fork in the road it had constructed through the law of criminal fraud. If the conviction were to be affirmed, it had to be solely on the ground that Noblett's offense was larceny because it was not false pretenses. It has been asserted above that this was the essential basis of the decision in *People v. Miller*. Indeed the People relied heavily on this decision in their support of the conviction, as must the Appellate Division have relied upon it in affirming the conviction.<sup>111</sup> But there was some trace of doctrinal support for the finding in *Miller* that title had not passed. The court could there talk of surrender of the property "for a specified purpose," and find a misappropriation in Miller's failure to use the property for the purpose specified. On the other hand, if Noblett's assertion that he needed the money to pay back rent could be said to have imposed upon him a duty to use the \$550 for this purpose, he acquitted himself of this obligation since he had in fact used the money obtained from the complaining witness for this purpose. The only aspect of his behavior which could be considered criminal was the false assertion of his intention to surrender possession of the apartment, by means of which he induced the complaining witness to pay him the \$550. This was not a false pretense for purposes of the crime of obtaining property for the same reason that Miller's misrepresentations were not, *i.e.*, because intention is not a fact. If the crime of larceny by trick was to be the vehicle by which this gap in the law of criminal fraud was to be bridged, and the opinion in the *Miller* case had strongly suggested that it was, then Noblett's conviction had to be affirmed for the same reason that Miller's was, but without benefit of the doctrinal pretext in which the reason was garbed in *Miller*. Noblett's conviction was reversed.

The majority ascribes its decision to the determination that title had passed as a matter of law. The court pointed out that in *People v. Miller* "the defendant obtained the property by false promise, but it was a false promise 'as to future operations with the property.' In the present case if there was false promise by the defendant it did not concern 'future operations with the property.'" <sup>112</sup> Thus the absence of

111. The affirmance was without opinion, 218 App. Div. 763, 218 N.Y.S. 853 (1926).

112. *People v. Noblett*, 244 N.Y. 355, 364, 155 N.E. 670, 673 (1927).

the doctrinal pretext for the decision in *Miller* is treated as fatal to the conviction. It may be doubted that it played so crucial a role. The court which decided *Noblett* was as strong as any which has sat in New York,<sup>113</sup> and it is clear from the dissent that the fundamental problem of policy inherent in the case was adverted to by the court.

Hasty reading of the dissent by Crane, J., in which Andrews, J., joined, may give the impression that the dissenters mistakenly assumed that the defendant was guilty of false pretenses, and that since he had been charged with both false pretenses and larceny there could be no prejudice to the defendant if the trial court had mislabelled his offense. Since this was the view of the case taken by four of the five Law Review comments on the decision,<sup>114</sup> such an interpretation is plausible. It is supported by the flat assertion in the dissent that there was evidence "to sustain a finding that a larceny of some kind had been committed, *either larceny by false representations or else common-law larceny.*"<sup>115</sup> But a careful examination of the opinion reveals that the dissenters were well aware that Noblett could not have been convicted of false pretenses. They quote the statement in the *Miller* opinion that "it would be difficult to show that the defendant in this case made any material false statement concerning any existing fact. His statements were all promissory in nature and character." And they assert that *Noblett* involves the same problem. The problem is not that Noblett was convicted of larceny when his offense was false pretenses. It is rather that since Noblett is not guilty of false pretense, he must be convicted of larceny or set free. There is a strong argument that Noblett should not be turned free, based on facts not mentioned by the majority. The dissent points out that Noblett had attempted on others the same fraud that had succeeded against the complaining witness.<sup>116</sup> The fact is also "dragged in by the heels" that Noblett had twice previously been convicted of larceny.<sup>117</sup> His eligibility for treatment as Loomis and Miller were treated having been thus established, the threadbare nature of the doctrinal pretext behind which the decisions in *Loomis* and *Miller* were made is exposed. It seems likely that the insistence

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113. Cardozo, C. J., Pound, Kellogg, Lehman, Crane and Andrews, JJ.

114. 27 COL. L. REV. 737 (1927); 22 ILL. L. REV. 779 (1928); 1 ST. JOHNS L. REV. 176 (1928); and 36 YALE L.J. 1020 (1927). Only the comment in 13 VA. L. REV. 655 (1928) points out that Noblett was guilty of larceny or nothing since his fraud was promissory.

115. *People v. Noblett*, 244 N.Y. 355, 368, 155 N.E. 670, 675 (1927) (Italics added).

116. "After getting the money, the defendant refused to deliver possession of the apartment, and was found inserting like advertisements in the paper to catch other victims." *Id.* at 366, 155 N.E. at 674 (Italics added).

117. "The defendant was indicted as a second offender because he has been twice before convicted of larceny." *Ibid.*



that Noblett's guilt is clear and that the case involved only a question of pleading and practice is simply the offer of an alternative doctrinal pretext, equally threadbare, behind which the basis of the *Miller* case might again operate clandestinely. The majority rejected this offer, and asserted: "It is the function of the Legislature to determine whether modern conditions dictate a wider definition of acts which should subject the wrongdoer to criminal responsibility."<sup>118</sup> It is probable that this court would have taken the same attitude toward *Miller, i. e.*, that they would have been as little beguiled by the pretext there adopted by the court as they were by that suggested by Crane and Andrews. Subsequently development of the New York law suggests the legislature could have dealt much more effectively with the problem had it been surrendered for legislative treatment at that point.

It was not until 1942 that the legislature addressed itself to the problem, and it appears that the legislature was entirely deceived by the fancy footwork of the *Miller* opinion and the *Noblett* dissent. It "solved" the problem of the *Noblett* case without expressly advertg to the issue upon which the case actually turned. It redefined larceny, but the new definition was substantially a codification of the then existing law. The only significant change inhered in the following provision:

"Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that: . . . The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property, or with possession as well as title. . . ." <sup>119</sup>

To the extent that this provision was aimed at the *Noblett* situation, and there is little doubt that this was its target,<sup>120</sup> it appears to be a complete miss. Noblett's defense was essentially that he had never converted the property of the complaining witness, since the witness had consented to his taking the \$550 and using it as his own. The

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118. *Id.* at 359, 155 N.E. at 671.

119. N.Y. PENAL LAW § 1290.

120. Since the analysis in the text makes this assertion incredible, the following excerpt is quoted from an article by the self-confessed draftsman of the amendment:

"In recent years, the legislation affecting the administration of the criminal law . . . has fallen, in the main, into three categories: . . . second, measures designed to rid the criminal law of confusion and rigid technicality which the years had encrusted on accepted procedure . . .

"2. Typical of these was the . . . 1942 amendment of Section 1290 of the Penal Law, which redefined the crime of larceny for the purpose of eliminating the nice distinctions and legal mumbo jumbos which had for years plagued and confounded court and prosecutor alike. [See *People v. Noblett* (1927) 244 N.Y. 355, 359.]" Fuld, *Amendments Dealing With Administration of Criminal Law*, 17 N.Y.S. BAR ASS'N BUL. 201 (1945).

prosecution's answer would be, "but you obtained this consent by fraud, and therefore it cannot avail you." This position would be supported by the following provision in the 1942 amendment:

"Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that: 1. The accused obtained possession of, or title to property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing. . . ."

Noblett would then say: "But you have totally failed to prove a false or fraudulent representation. All you have shown is that I made a false promise, and this court decided in *People v. Blanchard*<sup>121</sup> that this was not a false representation for purposes of the crime of obtaining property by false pretenses." Thus Noblett can avoid conviction (unless the court wants to overrule *Blanchard*) without ever mentioning that he obtained title to, rather than possession of, the \$550; and the "elimination" of this "defense" by the statute thus has no bearing on his case.

Since the amendment was preceded by a declaration that public policy required the elimination of the "distinctions which have hitherto differentiated one sort of theft from another," it may be wondered if the legislature did not have in mind that its new statute would operate as the lower courts permitted it to operate in *People v. Karp*. Karp obtained money from fourteen victims on the strength of a false promise that he would publish and distribute a telephone directory containing advertisements of the victims' businesses. He was convicted of larceny and his conviction was unanimously affirmed by the Appellate Division in a memorandum opinion which asserted: "Irrespective of the promissory nature of the representation, as distinguished from one with respect to an existent fact, it was a larceny."<sup>122</sup> The new larceny statute was cited for this proposition, but its application was not explained. Karp took his case to the Court of Appeals. From the authority cited in the outline of argument for the respondent contained in the report of the Court of Appeals decision, it may be gathered that the argument for conviction ran as follows:<sup>123</sup> In the *Miller* and *Smith*<sup>124</sup> cases convictions of larceny were affirmed, although the only

121. 90 N.Y. 314 (1882).

122. *People v. Karp*, 273 App. Div. 779, 75 N.Y.S.2d 169 (2d Dep't 1947).

123. N.Y. PENAL LAW § 1290, Subds. 1, 2, 3 (the 1942 amendment here under discussion); *People v. Miller*, 169 N.Y. 339, 62 N.E. 418 (1902); *Zink v. People*, 77 N.Y. 114, 120 (1879); *Smith v. People*, 53 N.Y. 111 (1873) (conviction of larceny by trick affirmed); *People v. Noblett*, 244 N.Y. 355, 155 N.E. 670 (1927); L. 1942, c. 732 (the amendment here under discussion, again); and *People v. Bearden*, 290 N.Y. 478, 49 N.E.2d 785 (1943) (a reckless driving case the relevance of which is not clear).

124. See note 123 *supra*.

fraud was promissory. In the *Zink* and *Noblett* cases, in which there was also promissory fraud, convictions were reversed because the defendants established that their victims had intended to part with title as well as possession as a result of fraud. The 1942 amendment to the larceny statute makes it immaterial that the victim intended to part with title as well as possession. Therefore in a case in which there is promissory fraud, a conviction of larceny is proper.

What this argument overlooks is that *because* it was held in *Smith* and *Miller* that *only* possession had passed, the subsequent treatment of the property obtained by the defendants as though they had obtained title as well as possession could be treated as a misappropriation. The intention of the victim to pass only possession and to retain the rights of an owner in the property while it is in the hands of the defendant is essential to the establishment of an unauthorized disposition which is in turn essential to the common law form of larceny of which *Miller* and *Smith* were convicted. This may be what the Court of Appeals had in mind in its per curiam reversal of *Karp's* conviction.<sup>125</sup> The opinion points out that the express purpose of the 1942 amendment was to eliminate internal distinctions between the types of theft, rather than to extend the criminal law to behavior not formerly reached by any type of theft. Since the trial court refused to instruct that a conviction could not be based upon representations of intention or as to future facts, the jury was authorized to convict *Karp* upon a finding that he was guilty of behavior which was not criminal prior to the 1942 amendment and which cannot be supposed to have been made criminal by it.

This decision prevented the 1942 amendment from producing a ridiculous result in New York.<sup>126</sup> Had the *Karp* conviction been affirmed, the law of larceny by trick would be as follows: larceny consists of taking another's property from his possession; a misappropriation by a person in possession of another's property shall be deemed a "taking from possession" if the possession of the property was obtained by fraud; fraud sufficient for this purpose having been established, defendant shall not be permitted to deny the subsequent misappropriation. The novel provision of the 1942 amendment would produce the last step of this analysis, for the effect of making it immaterial that defendant had obtained title to the property would be to deny him the right to prove that by treating the property as his own, he was doing precisely what the owner and he had agreed that he should do. Unfor-

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125. *People v. Karp*, 298 N.Y. 213, 81 N.E.2d 817 (1948).

126. Yet it is hard to see what *other* result the amendment can produce. A dictum on this score in the per curiam opinion in *Karp* would have been illuminating, since this opinion was written by Judge Fuld, who was also the draftsman of the 1942 amendment.

tunately, the *Karp* decision came too late to prevent the 1942 amendment from having something like this effect on the law of Ohio.<sup>127</sup>

## V. APPRAISAL OF WHARTON'S DOGMA

The deviousness of the expulsion of Wharton's dogma from the law of Massachusetts can perhaps be attributed to the characteristic reticence of the judiciary to acknowledge its legislative function. So indeed may the sleight of hand of the New York court in *People v. Miller*. However, the attempt of the New York legislature to legitimize this legerdemain, instead of facing up to the issue of promissory fraud, requires some other explanation. Although confusion doubtless had a hand in the enactment of this abortive legislation, it points also to something sacrosanct in Wharton's dogma which militates against its forthright rejection.

The toughness of the dogma is not easy to come at, for when it is upheld and applied, it is as a matter of course. The notable modern

127. The Ohio General Assembly enacted the following statute in 1943: "Whoever obtains possession of, or title to, anything of value with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing is guilty of larceny by trick. . . ." OHIO GEN. CODE ANN. § 12447-1. Compare this statute with the italicized portion of the 1942 amendment to the New York statute, which is set out in full:

"A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.

"Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that:

1. The accused *obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing; or*

2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property; or

3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property, or with possession as well as title; or

4. The purpose for which the owner was induced to part with possession of such property was immoral or unworthy." N.Y. PENAL LAW § 1290 (1942) (*Italics added*).

The adoption in Ohio of this fragment of the abortive New York statute appears to have had two startling effects. It appears to have abolished the promissory fraud dogma, despite the failure of its parent to achieve this effect, *State v. Singleton*, 85 Ohio App. 245, 87 N.E.2d 358 (Cuyahoga County 1949); *State v. Healy*, 156 Ohio St. 229, 102 N.E.2d 233 (1951). It has also abolished the requirement of an intent permanently to deprive the owner of his property from the crime of larceny by trick, *State v. Healy*, *supra*.

irregularity in this pattern—in fact, the only one found—is the opinion of the Court of Appeals for the District of Columbia in *Chaplin v. United States* in 1946.<sup>128</sup> The interpretation of the District's false pretense statute with respect to false promises was required for the first time at this late date. In deciding the case, the court was thus in a position to take account of the considerable 20th century ferment in the area of promissory fraud. Were it not obvious from the dissenting opinion that their noses had been thoroughly rubbed in this modern experience, the opinion of the court would compel the conclusion that the majority were not aware of it.

Chaplin was convicted of false pretenses under an indictment alleging that he had obtained money by a promise to purchase liquor stamps with it and repay the money, whereas he had never intended to do either. He appealed, attacking the sufficiency of the indictment in that it failed to allege the misrepresentation of an existing fact. Since the indictment was indisputably bad under the Wharton dogma, the issue was squarely raised whether or not the dogma was to be adopted in the District. Clark, J., writing for himself and Groner, C.J., treated the question as scarcely an open one. Having quoted from the 1932 edition of Wharton a statement of the dogma substantially identical to its original articulation of a century ago, he asserted that "the great weight of authority sustains this statement of the rule and compels us" to reverse the conviction.<sup>129</sup> The opinion might well have ended there had it not been for the goading of Edgerton, J., in dissent. He granted that authority in other jurisdictions was entitled to consideration but argued that the decision should not be controlled by "a count of foreign cases regardless of logic, consistency, and social need. . . . To let judges who lived and died in other times and places make our decisions," he suggested, "would be to abdicate as judges and serve as tellers."<sup>130</sup> He should probably be credited with provoking the first modern defense of the promissory fraud rule.

The essence of Judge Clark's defense is that promissory fraud is indistinguishable from innocent breach of contract except in the mental element. The mental element is generally determined by reasoning backward from the act, *i.e.*, in this instance from non-performance. A rule which makes promissory fraud criminal would therefore permit juries to punish innocent breaches of contract, would encourage disgruntled creditors to persecute judgment-proof debtors, and would materially encumber business affairs.

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128. 157 F.2d 697 (D.C. Cir. 1946).

129. *Id.* at 698.

130. *Id.* at 699-700.

It is a weighty objection to making particular behavior criminal that the behavior, although admittedly undesirable, could be readily confused by a jury with other behavior which is desirable. It is questionable that Judge Clark has validly raised this objection, however. In the first place, it is not necessary to permit juries to confuse false promises with mere failure to keep a promise. The *Restatement of Torts* takes the position that a false promise is actionable but asserts that non-performance is insufficient evidence to take the issue of fraud to the jury.<sup>131</sup> *A fortiori*, similar evidence would be insufficient to establish guilt beyond a reasonable doubt.

In the second place, it is difficult to appraise simple breach of contract as so desirable as to deserve special protection. It has received protection of a sort in the constitutional and statutory restrictions on imprisonment for debt. The restrictions exclude debts contracted through fraud,<sup>132</sup> however, and the policy underlying the restrictions is certainly not disserved by punishment of the type of simple breach of contract which might be mistaken for promissory fraud. Prohibition of imprisonment for debt does not reflect any felt public policy against payment of debts. The policy underlying the prohibition is the futility and social waste of imprisoning a debtor because he *cannot* pay his debts. Punishing promissory fraud involves no risk of disserving this policy.

The contrary argument is that when a jury learns that a defendant has refused to pay a contractual debt, it will look "backward from the act and . . . [find] that the accused intended to do what he did do."<sup>133</sup> Yet it is apparent that such an inference is conclusively negated by proof that he was *unable* to pay the debt because of circumstances of which he could not have been aware at the time of the promise. This would be true without the requirement of proof beyond a reasonable doubt. Thus it would seem that only two types of simple breach of contract would be threatened by unintended punishment as promissory fraud: first, those which are voluntary, and second, those which result from an inability to perform which the defendant might have anticipated at the time the promise was made.

To the extent that "business affairs would be materially encumbered by the ever present threat" that persons who *voluntarily* default in their contractual obligations "might be subjected to criminal penalties,"<sup>134</sup> business affairs might profit from a little encumbrance. To

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131. RESTATEMENT, TORTS § 530, comment c (1938).

132. See 1 COOLEY, CONSTITUTIONAL LIMITATIONS 714 (8th ed. 1927).

133. 157 F.2d 697, 698 (D.C. Cir. 1946).

134. *Id.* at 699.

the extent that this behavior "is as consonant with ordinary commercial default as with criminal conduct,"<sup>135</sup> the fault is with what is "ordinary" in commerce, rather than with a rule which might have the incidental effect of deterring such behavior. An accepted and effective technique of the criminal law is to punish behavior which, although it is not thought to be sufficiently reprehensible in itself to be made criminal, is yet thought to have little social utility and is seen to concur in a large number of cases with other behavior which is clearly criminal. The possession of burglar tools is an example. The universal acceptance by the public-minded of the anti-trust laws, despite their "material encumbrance" of business affairs, is sufficient evidence that commercial activity need not be exempt from the application of this technique. It is hardly likely that Judge Clark had deliberate default in mind when he spoke of "ordinary commercial default."

The promisor who could have anticipated his inability to perform at the time he made his promise thus presents the only special problem in the terms suggested by Judge Clark. Does the punishment of obtaining property by false promises unduly threaten the inadvertent punishment of innocent default in this restricted class of cases? The threat is obvious. The issue is whether it is undue. However, consideration of this issue must be preceded by a brief analysis of the mental element in criminal deceit generally. Distinguishing between behavior which the false promise rule should punish and that of which it might cause inadvertent punishment depends upon that analysis.

With respect to the mental element, the clear case of deceit is a purpose to deceive. Such is the case of the man who knows he has no bank account but represents to another that he has a \$1000 account in X Bank because for some reason he wants that other to believe something which he himself believes to be false. The clear case of innocent deception is the man who asserts that which he believes with good reason to be true under such circumstances that he is indifferent as to whether or not his assertion will be believed. The sincere but reasonably mistaken testimony of a subpoenaed witness might be such a case. Between these poles, the cases of deception range in accordance with their respective components of three variables, each consisting of the deceiver's attitude toward a discrete aspect of his behavior. The first aspect is the falsity of the representation; the second is the probability that the representation will be believed by the person to whom it is addressed; and the third, the likelihood that the induced belief will in turn affect the addressee's behavior.

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135. *Ibid.*

The first variable, the attitude of the deceiver toward the falsity of his representation, is thought to present a special problem with respect to false promises. Actually, it presents a baffling problem with respect to deceit in any form. In this respect, Judge Clark misleads by his suggestion that the punishment of promissory fraud would broaden "the accepted theory of the weight to be attached to the mental attitude of the accused."<sup>136</sup> It is not even actionable deceit, let alone a criminal false pretense, to represent as true that which is false. It is Hornbook law that "scienter," which Dean Prosser says "obviously . . . must be a matter of belief, or absence of belief, that the representation is true,"<sup>137</sup> is an indispensable element of tortious deceit. The focus of fraud upon belief in falsity, as distinguished from falsity itself, is dramatically illustrated by a holding of the United States Supreme Court that criminal fraud can be proved despite the exclusion of any evidence as to the falsity of the representation involved.<sup>138</sup>

The only distinction in this respect between fraudulent representation of a "past or present fact" and of intention to perform a promise is that the fact falsely represented is external in one case and mental in the other. It has been argued that this is an important distinction: that some guaranty against subjecting innocent persons to an inquiry into their thoughts is provided by the requirement of an externally observable discrepancy, between a fact and its representation, as the starting point for inquiry. It is true that such a discrepancy is susceptible to objective verification. It may be questioned, however, that such a discrepancy is a sufficient basis, in itself, for subjecting the representor to an inquiry into his thoughts. Without more, a misrepresentation is as consistent with unconscious ignorance as it is with conscious falsehood.

Properly defined, promissory fraud actually provides a more selective protection of the innocent from thought-scrutiny than does "fact" fraud. The external event which initially calls attention to the possibility that a person has committed promissory fraud is the failure to perform a promise. In the context of theft, in which the defendant must also have obtained property by means of the promise, this behavior will almost certainly amount to breach of contract. Thus the irreducible minimum of externally observable behavior necessary to evoke inquiry in promissory fraud is actionable misconduct, as compared to helpless ignorance in the case of "fact" fraud.

Of course, neither of these minima should be sufficient to warrant interference with the actor to determine whether or not he has been

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136. *Ibid.*

137. PROSSER, TORTS 728 (1941).

138. *United States v. Ballard*, 322 U.S. 78 (1944).



guilty of criminal fraud. In the case of factual misrepresentation, there ought at least to be evidence that the misrepresentor was conscious of the discrepancy between the fact and his representation, or that he should have been. For promissory fraud, there ought at least to be evidence that the promisor anticipated that he would not perform his promise, or that he should have. Whether in either case it should be made criminal for a person to have been ignorant of something he should have known is the crucial policy issue with respect to the mental element in theft by deceit. Whatever the resolution of this issue, however, proof that the defendant *should* have known ought to make a prima facie case, and nothing less than this should be sufficient. It is thus clear that the "mental element" is crucial in any type of deceit; that prima facie proof of this element must be effected by external evidence with respect to promissory fraud as well as "fact" fraud; and that to the extent a distinction exists, the external evidence sufficient for this purpose with respect to promissory fraud is the more reliable index of culpability.

To rise from the level of *a priori* analysis, on which Judge Clark pitched his defense of the dogma, to the level of empirical observation which was certainly available to him, experience in the several jurisdictions now punishing promissory fraud lends no support to his position. The evils which the judge portends are of a type which could scarcely exist unnoticed. Promissory fraud has been criminal under the mail fraud statute for more than half a century. For more than 25 years, it has been criminal in Rhode Island. In California, Nebraska, Louisiana and Ohio it has been criminal for at least five years. On the assumption that Better Business Bureaus in these states would be the first to learn of its oppressive use by creditors, reports of the existence of this abuse, or of any others, have been solicited from the bureaus in these jurisdictions. Responses from nine major cities in five different states<sup>139</sup> are unanimous in denying knowledge of the existence of this evil. Several of the bureaus undertook to discuss the problem with prosecuting attorneys in their cities, and the writer interviewed the Inspector in charge of a large metropolitan post office. Not a shred of evidence was found of the "flood of complaints" which would lend weight to Judge Clark's admonition against opening the way "for every victim of a bad bargain to resort to criminal proceedings to even the score with a judgment-proof adversary."<sup>140</sup>

The inference is strong that the defense of the traditional dogma does not rest upon objective analysis. It is more likely a manifestation

139. Los Angeles and San Francisco, Cal.; New Orleans and Shreveport, La.; Lincoln and Omaha, Neb.; Cleveland and Columbus, Ohio; and Providence, R.I.

140. Chaplin v. United States, 157 F.2d 697, 699 (D.C. Cir. 1946).

of what Professor Stone has termed with poetic aptness " 'the normative tendency of the factual,' that is, . . . the tendency of the human mind to graft upon an actual course of conduct a justification or even a duty to observe this same course in the future." <sup>141</sup> Holmes did not seriously discourage this tendency among lawmen by persuading them that "it is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV." <sup>142</sup> We tend to retain rules of law because they have been so laid down, but we think of better reasons for them. <sup>143</sup>

The rejection of the dogmatic exclusion of false promises from the scope of theft by deceit does not of course require their dogmatic inclusion. Problems of distinction arise which have required no consideration under the reign of Wharton's dogma. What is it that a false promise misrepresents? Does this misrepresentation necessarily inhere in all false promises? Does the fact that a promise is the vehicle of deception raise special problems in some areas? For example, is there something about a false promise to marry which makes its punishment undesirable? Or does the punishment of false promises to serve another involve a threat to basic civil liberties?

There are at least two approaches to the nature of the misrepresentation involved in a false promise. It is of course the interpretation of a promise as a misrepresentation of intention to perform which brings it within the scope of tortious deceit. Judge Edgerton's declaration that "[t]he meaning of words is the same whether their author is prosecuted civilly or criminally or not at all" <sup>144</sup> is not easily answered. Yet it will inevitably be objected that it is safer for purposes of the criminal law to construe a promise only as an assertion of *ability* to perform, because ability is "factual" rather than mental. There is little practical difference between these conceptions. In the overwhelming majority of cases, it is feasible to show lack of intention to perform only by proving that the promisor could not have believed himself able to perform. In neither the *Durland* case, <sup>145</sup> under the federal mail fraud statute, nor the *Miller* case, <sup>146</sup> under New York's veiled promissory fraud rule, was there any direct evidence of lack of intent. In each case, a jury found that the defendant had not intended to perform

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141. STONE, *PROVINCE AND FUNCTION OF LAW* 673-4 (2d ed. 1950).

142. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

143. The psychoanalytically oriented will see a strong analogy in Freud's report of the patient who was induced by post-hypnotic suggestion to open an umbrella in the house. When asked why he had done so, he replied that it looked like rain and he wanted to check his umbrella for holes before venturing out with it.

144. *Chaplin v. United States*, 157 F.2d 697, 700 (D.C. Cir. 1946).

145. See note 51 and text *supra*.

146. See note 100 and text *supra*.

his fantastic promise. The finding was sustained by evidence that a person of ordinary intelligence could not,<sup>147</sup> in view of what these defendants knew, have believed himself able to perform. There are cases, however, in which the promisor is quite able to perform, but where it is clear that he never intended to. The *Loomis* case<sup>148</sup> illustrates the inadvisability of exempting such promisors from criminal treatment. There is no doubt that Loomis and Lewis *could* have repaid the money they borrowed from their victim since they had it intact when they left him. Yet it was perfectly clear that they had never intended to do so; an intent to repay would have made their entire behavior meaningless. Another exceptional case would be that in which there would be no evidence of inability although an admission would be available as evidence of intent. Although the situations in which intent not to perform could be proved otherwise than through awareness of inability will be relatively few, there seems to be no good reason for excluding them by couching the rule in terms of the evidence which will usually support its application. When they occur, they are the clearest cases of deliberate deceit.

Do promises necessarily imply an intention to perform? Clearly the converse is not true. A man may inform his wife that he intends to be home for dinner without in any way suggesting a promise to do so. If he does not get home, he may be charged with instability but not with dishonesty. The wife may not be content with a prediction; she may want a commitment to an effort to fulfill the prediction. The husband who responds with a promise hardly excludes or dilutes his original representation of intention. He augments it. Clearly, an intention to perform is central to the ordinary promise.

It is possible to conceive of a rare breed which excludes it. Jones is undecided as to whether or not he should buy Smith's business. Smith prefers to sell to Jones but he has an offer from Brown which he must immediately accept or reject. If Jones knows that the business is well worth what Brown is offering, he might induce Smith to reject the offer with a guaranty that if he does not himself buy it, and Smith has to sell it for less than Brown offered, Jones will make up the difference. In a jurisdiction which allows reliance damages for breach of contract, the same legal result could be effected by Jones' simply contracting to buy the business at the price Brown offered. The cards are on the table, and both Smith and Jones know that Jones does not intend to perform. He had not as yet formed an intent. The "promise" in

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147. This is not to suggest that an objective standard is employed. Neither defendant had suggested that his intelligence was sub-normal.

148. See note 93 and text *supra*.

this situation is a legal formality designed to effect a binding contract, and it clearly does not imply an intention to perform.

Before a decision is reached that this situation requires special treatment under a criminal fraud statute, however, two factors should be considered. First, it should be observed that Jones' contractual "promise" is not devoid of any representation of intention. It rather represents two intentions in the alternative. Jones represents that he intends to perform or to respond in damages in accordance with a measure of damages understood by both parties. Proof that he was aware that he was insolvent, or otherwise unable or unwilling to perform *either* of the alternatives, would establish a fraudulent mental attitude under any interpretation of the promise. Second, the successful use of a promise to convey this special meaning requires some legal sophistication in both parties.

The significance of this second factor is that no hardship<sup>\*</sup> will be worked by an unequivocal declaration that, for purposes of the law of theft by deceit, a simple promise will be construed to include a representation of intention to perform it. The legally sophisticated will adjust the language of their contracts accordingly by spelling out the special meaning which the parties intend. The legally innocent who rely on the normal meaning of words will be protected against post-contractual discovery of the sophistication of the person with whom they have dealt.

The remaining problem to be considered is the possibility that the blanket inclusion of false promises within the ambit of theft will create difficulties in special areas. The promise to marry suggests itself as involving peculiar problems since the civil enforcement of such promises has been abandoned in several jurisdictions. The wide-spread use of the breach of promise action as an instrument of extortion is said to be the reason for its abolition.<sup>149</sup> At first glance, it would seem that the threat of criminal prosecution would be an even more effective instrument of extortion than the civil remedy. Two factors should reduce alarm at the prospect of punishing false promises to marry as theft. Theft excludes all insincere suitors excepting those who use a promise to marry as a means of obtaining property. The overlibidinous will not be threatened as such, and the problem becomes one of determining how much protection society should give to the commercial Lothario. There is little to be gained by declaring him lawful game for fortune-hunters. However, he seems to be adequately protected by a second factor which distinguishes criminal prosecutions from the civil breach of promise action. In most jurisdictions, criminal prosecutions are

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149. HARPER, PROBLEMS OF THE FAMILY 169 (1952).

subject to the control of a public officer. It is not likely that he will draw bills of indictment to settle disputes between fortune-hunters. The *threat* of complaining to a prosecutor will be correspondingly devalued as a tool of extortion.

These same factors, and particularly the focus of theft on *acquisitive* techniques, reduce the likelihood of special problems being created in other areas by the punishment of false promises. It may be suggested, for example, that the prohibition of involuntary servitude will be circumvented by the threatened prosecutions for false promises to perform services. To the extent that there is legitimate concern on this score, it probably should not be allayed by the exemption of promises of this nature. Correspondence with the Better Business Bureaus indicates that one of their most pressing current problems is the practice among dishonest building contractors of receiving payment in advance for alterations and repairs which they have no intention of making. Certainly the policy behind the prohibition of involuntary servitude is not disserved by sanctions which will discourage the making of such false promises—or encourage their performance. Concern for the promisor of services to another is properly limited to the down-trodden. Typically, this class is not paid in advance. When they are, it is hard to say they should be licensed to procure this advantage by fraud. To the extent that they should be, this license probably ought to be extended to taking as well, and should be incorporated into a general provision making economic necessity a defense to petty theft.

It is possible that further experience with the punishment of false promises as false pretenses will expose situations which require special treatment. They do not suggest themselves, and there seems to be no danger of injustice in the outright extension of false pretenses to include false promises. Prosecutors' discretion and executive clemency are both available to reduce hardship in initial cases revealing areas which might better be excepted from the general rule. Legislative solution of such problems must await their discovery outside the imagination of scholars and judges.